MADURAI KAMARAJ UNIVERSITY
(University with Potential for Excellence)
DISTANCE EDUCATION

# B.G.L.

## FIRST YEAR

### Paper - 6

# LEGAL THEORY

Recognised by D.E.C.
www.mkudde.org

S 235

# MADURAI KAMARAJ UNIVERSITY

(The University with Potential for Excellence)

**DISTANCE EDUCATION**

## B.G.L. First Year

## PAPER - 6

# LEGAL THEORY

(Recognised by D.E.C.)

w.w.w.mkudde.org

© All copy rights & Privileges are reserved

**S 235**

Printed at Reva / C - 500 / 2012

***Dear Student,***

Apart from the fact that The study of law help you to fight against exploitation the fact remains that our very life is possible only because of the State and its laws. Today the states everywhere have become leviathan and the cry is that there is too much of laws, so that not even the judges and the lawyers can keep abreast of the laws. We cry that we are shackled by the laws of our country. But as Cicero has pointed out, "We are the slaves of law that we may be free". The law touches our life at innumerable points.

So dear students you realise how important it is that a man should equip himself with legal knowledge for his overall welfare and happiness. So we exhort all the students to diligently make a deep study of the lessons as well as the prescribed text books. For convenience, the syllabus is divided into 10 units. The D.D.E. has arranged contact seminar classes at various centres in Tamil Nadu. You will be receiving intimation in this regard. Please attend the classes regularly and benefit by personal contact with Teachers in clearing your doubts in the subject.

Good Luck!

Law of property - meaning, kinds of property and modes of acquiring property - Law of obligation.

Ancient Law: Evolution of Law; Historical Development of Law of Nature: Genesis of the State - Evolution of criminal law; wills - private property: Contracts: Law of persons.

Comparative Law: History of comparative law, Uses of comparative Law. Unification, comparative Law and other disciplines.

## FURTHER READING

1. Jurisprudence, V.D. Mahajan 5th Edition, Eastern Book Company, Lucknow.
2. Jurisprudence, P.S. Achuthan Pillai, Reprint 2006, Eastern Book Company, Lucknow.
3. Jurisprudence and Legal Theory, G.C.V. Subbarao, 9th Edition, Eastern Book Company, Lucknow.
4. Legal Theory – Monica David.

# SYLLABUS

## LEGAL THEORY

The nature of Jurisprudence - Definitions: Jurisprudence as a Social Science: Schools of Jurisprudence

Law - Meaning - Definition, - Classification - Conventional law, Constitutional law; autonomic law, international law; imperative law. Theory of imperative law: Salmond's definition of law: Theories regarding kinds of law, The State; Sovereignty.

Sources of law: Legislation - Interpretation of Statute law: Judicial precedent - kinds, Classification; Theories as to nature of Judiciary law. Custom - nature - kinds - tests of a valid custom" Theories regarding its nature.

Legal rights and duties: Definition of right and wrongs Theories regarding rights and duties. Salmond's and Austin's Theory of Absolute Duties; Characteristics of a right etc., Rights in the wider sense of the term, kinds and classification of rights and duties.

Titles - Definition - Vestitive facts; Acts in the Law and Acts of the Law; Agreements - Persons. Nature of personality, Kinds of persons in law: State as a corporation etc. Theories as to the personality and of a corporation.

The administration of Justice - Civil and Criminal Justice. Theories of Punishment - Liability remedial and Penal liability - Intention and negligence, motive, malice etc, Negligence - Duty to take care and Theories as to the nature of negligence. Absolute and Strict Liability - mistake of law and fact, accident.

Ownership - Austin's definition, Characteristics and kinds of ownerships - Trust and Beneficial ownership - Legal and Equitable: Vested and Contingent. Conditions precedent and Conditions subsequent possession : an analysis: Concurrent possession: Modes of acquiring possession: Incorporeal possession: etc.

# CONTENTS


| Unit No. | Topic | Pages |
|---|---|---|
| 1. | Jurisprudence | 1 |
| 2. | Classification of Laws – Theories of Law – State | 14 |
| 3. | Sources of Law | 48 |
| 4. | Legal Rights and Duties | 83 |
| 5. | Titles – Persons – Nature of Personality - Theories of Personality | 102 |
| 6. | Administration of Justice – Theories of Punishment – Negligence – Absolute and strict Liability | 125 |
| 7. | Ownership – Possession | 149 |
| 8. | Property – modes of acquiring property | 177 |
| 9. | Ancient Law – Development of Law of Nature – Evolution of Criminal Law – Law of contract | 196 |
| 10. | Comparative Law – Uses of Comparative Law | 228 |
| | Model Questions | 245 |

# UNIT -1

# JURISPRUDENCE

## INTRODUCTION

*"A lawyer without history or literature is a mere mechanic, mere working mason"* - Sir Walter Scott.

Knowledge of history and literature is important for a person who wants study Law. For a proper understanding and acquisition of knowledge of law, the study of jurisprudence is an essential like as the study of grammar for precise learning of Language The study of the first principles of law analytically, philosophically, historically and scientifically is essential for the enrichment of the law. The word jurisprudence denotes knowledge of law. The word jurisprudence is derived from the Latin word. Therefore it is necessary for us to understand the nature of jurisprudence and the value and purpose of studying jurisprudence. In this unit we are going to study about various definitions of jurisprudence and schools of jurisprudence

## OBJECTIVES

- To understand the meaning and scope of Jurisprudence
- To analyze the scope of Jurisprudence as Social Science
- To learn about various schools of Jurisprudence and criticism of these schools

## UNIT STRUCTURE

1.1. Definition

1.2. Jurisprudence and social science

1.3. Schools of Jurisprudence

1.4. Summary

(Space for Hints)

1.5. Key words

1.6. Answer to CYP questions

1.7. Model questions

## 1.1. DEFINITION OF JURISPRUDENCE

The word jurisprudence denotes knowledge of law. The definition is not so simple as it appears to be. As there are as many definitions for jurisprudence as there are jurists. It may not be possible for us to go into all definitions; We shall look into the views of leading jurists for the present.

Jurists have not succeeded in giving a very satisfactory definition of jurisprudence so far. It is a subject which deals with ever changing ideas.

Professor Julius Stone defines 'Jurisprudence as " a chaos of approaches to chaos of topics, chaotically delimited". This bound to result in confused thinking that Jurisprudence cannot be studied intelligently and scientifically. Far, from it modern jurisprudence trenches on fields of the social sciences and of philosophy, it digs in to the historical past and attempts to create the symmetry of a garden of the luxuriant chaos of conflicting legal systems. Jurisprudence is the study of Law, not of any one country or community, but of the general notions of Law itself".

**1.1.1.Salmond** has described jurisprudence "as a science of the first principles of Civil Law".

By the term Civil Law, he means that jurisprudence is concerned with law as it is existing in the society, that is law of the State. Here the term Civil law is used in a generic sense to mean the law made by the superior political authority to control political inferiors. In other words, he means that the principles recognised and applied by Courts in the administration of justice. Further, by using the word civil law as the law of the State, he excludes the other rules which regulate human conduct in Society, viz. rules emanating from theology or ethics. Though the laws of moralists are man made and they are existing in society, jurisprudence is not concerned with moral rules. It is concerned only with rules derived from authoritative sources as recognized and applied in the process of

(Space for Hints)

administration of justice. Further, he also gives emphasis to the fact that jurisprudence is concerned with first principles of civil law. By the term first principles, he means that jurisprudence is concerned with fundamental principles of positive law and not with concrete details about the various departments of law. Here it may be mentioned that positive law has the same meaning as theory of civil law. One more point given importance by Salmond in his definition is that the subject is a Science. He calls it as a science because the legal rules are systematically analysed, classified and tabulated while dealing with the subject. A subject which can be analysed and classified then it is a subject of science and its study is a scientific study.

Now it is clear that since jurisprudence is concerned with analysis and classification of results of investigation of law and legal systems, it is a science. Salmond has put it "jurisprudence is the name given to a certain type of investigation into law, an investigation of an abstract, general and theoretical nature which seeks to lay bare essential principles of law and legal systems". In the same way other eminent jurists have also made attempts to explain the nature of jurisprudence according to their own views about the subject.

**1.1.2 Austin** defines Jurisprudence as "Philosophy of Positive Law".

Though he has described jurisprudence as concerned with positive law, i.e., law of the State as described by Salmond, yet the term philosophy used by him in describing the subject is some what misleading. The term philosophy refers to the most-general theories of things, both human and divine, while in jurisprudence we are only concerned with man made law and there is no place for divine or moral rules. For the above said reasons, the definition of Austin is not an acceptable definition.

**Check Your Progress**

1. Define Jurisprudence. Jurisprudence as a 'science of the first principle of civil law' – Explain.

**1.1.3.Holland** defines jurisprudence as "formal science of positive law".

This definition of Holland is almost akin to that of the definition of Salmond. Holland also brings out the idea that jurisprudence is concerned with positive law or civil law. He concurs with Salmond. The definition is in line with that of Salmond's definition when he defines jurisprudence as a science. Salmond described jurisprudence as concerned with first principles of civil law. Holland has described it as a formal science. By the term formal, Holland means that the

(Space for Hints) subject is concerned with the rules generally recognized as having legal consequences without going into concrete details.

The above definition as laid down by eminent jurist met with serious criticisms in the hands of other jurists like Professor Gray and others. Yet, whatever may be the criticisms, the definitions of Holland and Salmond brings out the idea that jurisprudence is concerned with the fundamental principles of legal systems and it is a scientific study without going into the concrete and practical details of the different departments of law.

Salmond makes a distinction between general and particular jurisprudence. For general jurisprudence he means that the subject is concerned with principles and notions and distinction common to all systems of law, whereas particular jurisprudence is a science of any one of such systems of law. Now, we are only concerned with general jurisprudence which deals with the fundamental principles underlying the subject matter of study.

## 1.2. JURISPRUDENCE AS A SOCIAL SCIENCE

Man is a social animal, and any science which studies and deals with the conduct, attitudes of man and his relations in society is a social science.

Normally man cannot live alone. An individual cannot do without the family and in like manner the family forms part of larger society and no society can continue without some uniform practice and habits of life. There must be rules and regulations giving liberty as well as imposing constraints to achieve the aims of the society and maintain peace and order. For the above said reasons, the mutual relations that grow up among human beings are the very bonds of a society. Those rules which regulate such bonds in society can be made a subject matter of a systematised study. Such a systematic study when properly co-ordinated becomes a distinct science. A science which considers man as a social and spiritual being and deals with his activities may be designated as a Social Science.

The next argument is that, other social sciences are dependant upon law. They could never exist but for law , for example ethics lays down rules for ideal conduct . Law to a large extent is based upon these ethical conceptions. Ethics

thus depends upon law enforcement of some of its rules .so the highest ethical function of the law is to make possible the maintenance of ethically good society.

Jurisprudence is very closely connected with **Political Science** which deals with people and their Government. Good Government depends upon good law and laws depend on the existence of a state and its Government .Hence the political science and Jurisprudence are interdependent.

Jurisprudence has also close connection with **sociology**. Sociology makes an attempt to study the thoughts and actions of human beings their social development in all aspects, like religion, climate, faith, custom, etc. and it is rules and regulations which give effect and enforcement to the principles and norms laid down by the sociologists for improving the social conditions in society.

**Economics** deals with the social phenomena centering about the provisions for the material needs of man. Further there is very close connection between economics and jurisprudence. In economics we are concerned with the provision of material ends of the individual and of organised groups. To put it into simple language a study of satisfying wants, production and distribution of wealth. In fact, great revolution was brought into existence by Karl Marx by bringing into existence the relation between law and economics. The production and distribution of wealth has to be regulated by rules which are enforced if needed by the courts of justice.

From the above facts it is clear that jurisprudence is a social science. Social science and law are interdependent in the sense, the rules of law are drawn from the norms laid down by the social sciences and the social sciences are alive because their norms are thus enforced by law.

## 1.3. SCHOOLS OF JURISPRUDENCE

### Introduction

The evolution of modern jurisprudence can be safely stated that it has taken its birth in the 17th century. Jurists studied law from different angles. Hence various theories of law advanced by legal theorists are of particular value for our investigation and also serve a emphasize the different facts of law. Jurists

(Space for Hints)

and their ideas have been grouped into 'school'. A school is nothing but an idea of thought supported by a group of persons. There is only one science of law just as there is only one truth, but there are different methods of approaches to study that science. These schools indicate for us the method of study they have chosen. The school is called by particular method, only because that method predominates in that school. They do take note of historical facts and social conditions also.

Salmond has observed 'jurisprudence in the specific sense as theory of philosophy of law is divisible into three branches'. He refers to three schools of law i.e., Analytical, Historical, Ethical or Philosophical. In addition to this, we shall discuss the sociological and the comparative schools also.

### 1.3.1. Analytical School

Austin is the founder of this school in England so we find that this school is called as the **Austinian School**. This school is also called as **Analytical School, Imperative School, Positive School** and **English School.**

Austin is concerned only with mature systems of jurisprudence of modern societies and proceeds to analyse its basic concepts and to classify them in a scientific manner. As this school is concerned with analysis it is called the **Analytical School.**

Austin considers that law is imperative or command emanating from the state. That is the reason this school is also called as **Imperative School.**

Austin says that jurisprudence is concerned with law as existing in the society and not with the past or future of law and that is the reason this school is also called as **Positive School.**

The jurists belonging to this school study law by analyzing it into its various ingredients. There is an examination of its nature , the sources of the power , the sanction behind it and the general principles underlying init.

**Check Your Progress**

2. Explain the scope of Analytical School.

Austin followed Bentham and took the tool of analysis and thereby successfully brought into existence his school of thought.. Analysis reveals Austin's fountain to be rather unstable. Firstly, there is no universal rules of law ;

secondly, there are few concepts which are common to all legal systems and as on today from such system is universal principles are to be drawn is to run into danger, because research has shown that there are no concepts which are common to all legal systems. Even the few concepts which appear to be uniform or universal is based on narrow view of science of law.

***Criticism*** : Several criticism have been made against this definition of law by Austin and the Analytical School. Apart from criminal law, which is in the nature of commands, there are certain branches of law which empower people to achieve certain results which are enabling and beneficial provisions rather than commands. The important criticism is that Austin's definition merely emphasises force of the state and does not take note of its ethical content. This theory also refuses the name of law to rules which are generally classified as legal i.e. customary law, international law and constitutional law, as none of these rules originate from a sovereign, to define law as command can mislead us in several ways. Further, the term command suggests an existing personal commander but in modern legal systems, it is impossible to identify a personal commander in that sense.

This school was responsible for further work in this field by other eminent jurists like Kelson who propounded the 'Pure Theory of Law'.

### 1.3.2. Historical School

Savigny is the founder of the school. This school is continental school and its birth is in the eighteenth century. This school posing the question how did law come to be and answer by saying the law evolved just like language by a sole process as a peculiar product of a nation's genius. According to the school law is not a command of the sovereign but a spontaneous emanation from the life and spirit of the people To them law is based upon the instinctive sense of right possessed by every race.

The source of law is not the sovereign. Law is found and not made. Further, he says law is independent of political authority and it is the product of the society and as such no organised society is necessary. This school also emphasises the fact that law rests on social pressure and the typical law is a customary rule. Savigny further said, " Law is a manifestation of the common

(Space for Hints)

consciousness Law grow with the growth and strengthens with the strength of the people and finally dies as the nation loses its nationality.

***Criticism*** : One important criticism of this theory, if adopted that it stultifies rather than encourages the growth of the legal order.

Here the Savigny failed to note not all laws are based on the conviction of what is right possession by a people. There are laws which based on the selfish interest of a small power full minority, such as a ruling oligarchy, for example law of slavery. Practically throughout the world at one time or other slavery was a legally recognized institution regulated by laws and slavery in any form is bad.

Further as per Savigny theory, laws has and do grow out of conscious effort. In a dynamic society, especially when customary law cannot be created over night (custom to become a rule of law, requires that it be observed continuously from time immemorial) there is a need for conscious effort. The law has to be made deliberately and openly to suit changing conditions in society e.g Labour Legislation, Economic Legislations.

Imitation also plays a role in the development of the legal system. The laws of one country are freely borrowed by other countries. Is there any system of law of any country which has not borrowed from Roman Law? Roman law when the Roman emphire went into decay had reached such maturity, that its principles even today are quoted before courts to be adopted in the judicial decisions. And lastly there are laws which are based not on the conviction of what is right possession by any one people, but which are cosmopolitan in origin such as Mercantile Law.

The historical school studies law in a time sequence, tracing their evolution and development from primitive times to modern times. The study also take note of legal history in their social back ground in order to propound the theories and formulate their definitions.

Eminent jurists like Sir Henry Maine supported this school. When Sir Henry Maine introduced the historical movement in England in 1861, he brought more balanced view to bear upon the study of Law. In fact Sir Henry Maine occupied the chair of historical comparative jurisprudence in Oxford and the

(Space for Hints)

published various books like 'Ancient Law', 'Village Communities', 'Early History of Institution' etc, based on historical study of legal systems. He and his followers Maitland, Holmes, Thayer and others said that law is not based on the conviction of people but on the peoples intention to make law. This is a rational and practical view because society is never static. All the time there is a exchange and progress. Man's ideas of what is truth and justice is also changing and laws have to keep in harmony with these changes.

As to the method employed by these jurists, they take up a legal institution in time sequence. They are more interested in the past i.e the primitive institutions of society. They trace the evolution, the growth and development of law through the ages with emphasis upon social conditions which influenced such evolution and growth. So to them the typical law is a customary rule spontaneously evolved by historical necessity and popular practice. Law is an organic growth; it is found and not made

The achievement of the historical school consisted in over throwing the dominant rationalist tendency in jurisprudence and substituting in its place an empirical tendency which was started by the analytical school of jurisprudence which had nothing to do with historical school.

### 1.3.3. Philosophical School

This school is also called as **Ethical school** or **Metaphysical or Law** or **Nature School** or the **Theological school.** The school propounds that in reality law consists of rules based on reason and nature. It studies the existing law from the point of view of its ethical significance and adequacy. It is more concerned with the purpose for which the law is made and whether or not that purpose is fulfilled. **Hugo Grotius** is regarded as the **father of Philosophical jurisprudence.** The central notion is that there exists objective moral principles which can be discovered by natural reason and that ordinary human law is only true law in so far as it conforms to these principles. This school concerns itself with law in relation to certain ideals which law is meant to achieve. This school is concerned with "what should be the ideal and law what should guide us in developing the law". This school investigates the purpose of law and the measure and the manner in which that purpose is fulfilled. This school seeks answers to

> **Check Your Progress**
>
> 3. Discuss the scope description of Philosophical School.

(Space for Hints)

the problems of validity of law and ultimately stresses that law is intimately related to justice. There is closed connection between law and justice. This school brings out close relationship between law and Ethics.

In England, Bentham is said to be father of this school. He studied law from the point of view of "its ethics significance and adequacy". Law to him was a means to an end, the end being, "the greatest happiness of the greatest number". This happiness he said could be achieved by promoting justice in society. If the laws do not fulfill the purpose for which they have been created then suggest reforms to be introduced in future. So he is a reformer .He is regarded as the architect of the modern social welfare state.

This philosophical school was also supported by Hegel's evolutionary theory. He demonstrates that legal order comes into existence by a synthesis of conflicting egos in the society. This is in consonance with that of his doctrine of dialectical process.

### 1.3.4. Sociological School

Souffle is to say that at the end of the 19th century and the beginning of the 20th century jurists everywhere began to think of law not in terms of the state or sovereign, not in terms of a people's conviction of what is good or in terms of people's will to make law, not in terms of its ethical content, but in terms of the wants, interests, desire and aspirations of human beings in society.

**Roscoe Pound** who is the modern pioneer in this field of thought. He defined law is a weapon for social engineering. The purpose of law is to satisfy the wants and desires of the individual in society.

Erhlich, another exponent of this theory, believed that where the wants and desires of humans in society are satisfied, there will be social solidarity in society so that peace and order may prevail which alone will bring about a stable government.

> **Check Your Progress**
>
> 4. Discuss the views of Sociological school.

This school is complex interplay of values both social and individual underlying the law the influence of social changes on law, the effectiveness of law way it is obeyed , if disobeyed the reasons for such disobediences and so

(Space for Hints)

forth. Law it must always be remembered is a living thing, changing , growing and sensitive to its environment.

According to Roscoe Pound society can be organised and regulated. In order to carry out the process of social engineering. Roscoe Pound classifies various interests which are necessarily to be protected by the law. He divides interests into Private, Public and Social interests. For protecting these interests and process of making law for that purpose he lays down jural postulates,

e.g. a) one should be able to appropriate for his own use what he has created

b) that others should not commit any aggression against him

c) that others will perform their act and will not expose others to any injury unreasonably

d) that the people with whom they live will carry out their undertaking and that too in good faith

e) that he will have security of job

f) that the society will bear the burden of supporting him when he is old and

g) that the society will bear the risk to the individual due to unforeseen circumstances. The above postulation clearly establishes the sum and substances of the views of sociological jurists and approach of sociological school of legal phenomena.

### 1.3.5. The Realist School

There is yet another school that is prevalent in America. This school is called as **Legal Realism**. According to this School, law is not made by legislation. But all laws however made is recognized and administered by the Courts and if no rules are recognized and administered by Courts which are not rules of law. It is, therefore, to the Courts and not to the legislature that we must go in order to ascertain the true nature of law. So, according to this school ultimately law is made by Courts and eminent judge. This school is supported by

**Check Your Progress**

5. What is meant by legal.

(Space for Hints)

one of the greatest American Judges Wendall Holmes. The theory of this school cannot be easily acceptable one.

### 1.3.6. Comparative School

This comparative method is simple. A jurist takes for study the laws of several countries and rejects what is not essential, what is temporary or transient and takes what is common to all systems, essential and permanent and on these factors formulates his definitions and theories. Sir Henry Maine was both a historical jurist and a comparative jurist. His work "Ancient Law" is a classic example of a happy combination of both the methods. This was only recently recognized as a science of law.

## 1.4. SUMMARY

Jurisprudence means knowledge of law. As there are as many definitions for jurisprudence by various jurist. Each jurist defined in their own way or according to their belonging to the schools

It is a subject which deals with ever changing ideas. Austin, Salmond, Holland are the eminent Jurist defined the term jurisprudence in their own way. The definitions of Holland and Salmond brings out the idea that jurisprudence is concerned with the fundamental principles of law legal systems and it is a scientific study without going into the concrete and practical details of the different departments of law.

Various theories of law advanced by Jurists are of particular value for our investigation and also serve and emphasize the different facts of law. Jurists and their ideas have been grouped into 'school'. In this unit we have studied different schools like Analytical School, Historical School, Philosophical school, Sociological school, Realist school and comparative school.

## 1.5. KEY WORDS

| | | |
|---|---|---|
| *Jurisprudence* | - | Knowledge of Law |
| Propounds | - | Propose |
| Chaos | - | disorder |

## 1.6. ANSWER TO CYP QUESTIONS

(Space for Hints)

For Question No. 1 - Refer section 1.1.1

For Question No. 2 - Refer section 1.3.2

For Question No. 3 - Refer section 1.3.4

For Question No. 4 - Refer section 1.3.5

For Question No. 5 - Refer section 1.3.6

## 1.7. MODEL QUESTIONS

**(A) Long Answer questions**

1. Law that brings greatest happiness to the greatest number would be ideal to a given society. Critically evaluate the statement in the light of positivist approach to the theory of Law.

2. 'No individual school of Jurisprudence is able to explain the complex phenomenon of law completely' Explain.

3. What is the approach of the members of the philosophical jurisprudence, towards positivism?

**(B) Short answer questions**

1. Who is the father of Theological school? What is the main contribution of the School?

2. Which school defined "Law is a weapon for social engineering'?

3. Who defined jurisprudence as "formal science of positive law"?

4. What is the importance of Positive school?

# UNIT – 2

# CLASSIFICATION OF LAWS – THEORIES OF LAW – STATE

## INTRODUCTION

The definition of Law given by each of the jurists vary according to the school of thought from which they studied law. So, it is necessary for us to understand "What is law". Jurists have spent much time over the subject and they have done it not for the sake of a formal elegance for beginning the subject, but to provide a definition as far as possible to explain what is law from their point of view. In this unit we are going to study the various theories of Law along with criticism

## OBJECTIVES

- To know the definition and meaning of Law.
- To know the various classification of Law.
- To study various theories of Law.

## UNIT STRUCTURE

2.1. *Meaning and definition of Law*

2.2. Classification of Laws

2.2.1. Conventional Law

2.2.2. Constitutional Law

2.2.3. Autonomic Law

2.2.4. International Law

2.2.5. Imperative Law

2.2.6. General Law and special Law

2.2.7. Public and Private Law

2.3. Theories of Law

2.3.1. Imperative Theory of Law

2.3.2. Salmond's Definition of Law

2.3.3. Kelson's Pure theory of Law

2.4. Administration Justice through Law

2.5. State

2.6. Kinds of State

2.7. Sovereignty

2.7.1. Austin's - Theory

2.8. Summary

2.9. Key words

2.10. Answer to CYP Questions

2.11. Model questions

## 2.1. MEANING AND DEFINITION OF LAW

Some of the jurists attempted to define law, as the product of the state. Yet others concentrated on the content of the law. There are other jurists who stress the function of the law in society and described functions of the law as it works in actual practice. It may not be possible for us to go into the definition of all the leading jurists at this stage to understand 'what is law'. It is sufficient for the present to consider the definition of a few of the eminent jurists. The problems of defining the term may be approached from the point of view of the theologian, the historian, the sociologist, the philosopher, and the political scientist or lawyer.

**Austin** has defined law in terms of the state as follows :

"Law is the highest reason, which commands those things which are useful and necessary, and forbids what is contrary thereto".

(Space for Hints)

These commands imply first sanction and duty secondly, that only the state or sovereign can create positive Law.

**Sir Henry Maine** and his followers defined Law in terms of the people's intention to make laws for establishing patterns of conduct.

**Cicero** has defined Law as rules which seek to establish conduct which is ethically satisfactory.

**Balckstone** defined Law as rule of civil conduct, prescribed by the supreme power in the sate, commanding what is right and prohibiting what is wrong.

**Salmond** defines law as 'the rules recognized and acted on in courts of justice.

The above definitions shows that there is no definition comprehensive enough to embody all characteristics. In short Law is a rule of conduct.

## 2.2. CLASSIFICATION OF LAWS

Generally laws are classified as follows

1. Conventional Law
2. Autonomic Law
3. Constitutional Law
4. International Law
5. Imperative Law

### 2.2.1 Conventional Law

Conventional Law is the body of rules which came into existence as the result of agreement amongst persons for the regulation of their conduct towards each other. It binds those persons who have agreed to be bound by it. When Conventional law is enforced by the State, the same is regarded as part of the Civil Law.

The most important branch of conventional Law according to Salmond is the Law of Nations, which consists of those rules which sovereign state have agreed to abide by as regulating their relations with one another.

### 2.2.2. Autonomic Law:

Normally law is made by the sovereign, occasionally private persons are permitted to make law and to which a sovereign power grant its authority and such a law which is established by private person or private body of persons and sanction granted by the sovereign authority is called autonomic Law.

For example, by laws made by any University or by Railways or by Life Insurance or Municipal Corporation. It is not the general law in the sense it does not being all persons, all things, all events within the territory, but only within the sphere of authority.

Conventional law and autonomic law may assemble, in that they are both created by private persons and are kinds of special law. Yet there is an essential difference between the two. While autonomic law binds all persons within its sphere of authority, Conventional law binds only those persons who have agreed to be bound by it. Autonomic law is thus a species of lāw which is enforced by the state, though made by private persons independent of any agreement on the part of those who are could bound by it whereas conventional law is based purely on agreement.

### 2.2.3.Constitutional Law

Constitution may be defined as "the fundamental law of the State which contains the principles on which Government is founded, regulates sovereign powers and directs to what person each of these powers is to be entrusted and manner of its exercise".

**Dicey** defines "Constitutional Law as the term is used in England appears to include all rules which directly or indirectly affect the distribution or exercise of sovereign power in the State". From these definitions it is clear the Constitutional Law deals *with fundamental and far reaching principles governing the structure of the State.*

According to Austin's view Constitutional law is not law in the strict sense. According to his definition of law, positive law is the command of the sovereign and his own law does not bind sovereign. The sovereign is above the law. But Constitutional law binds or controls the sovereign. Also positive law is

supported by a sanction, whereas Constitutional Law has positive sanctions for its enforcement. Hence Austin observes "Constitutional law is positive morality merely and is enforced merely be moral sanctions". In his opinion, Constitutional Law depends upon force only from public opinion. It therefore belongs to the class or moral rules and law in the strict sense or law properly so called.

Salmond observes that Constitutional Law is both a matter of fact and a matter of law. He says that the constitution of a State as a matter of fact is anterior to the constitution as a matter of law. As soon as the constitution comes into existence as a matter of fact, a body of rules comes into existence to regulate in the various organs of the constitution as a matter of fact. Thereupon a legal theory is woven round the constitution as a matter of law called constitutional law. So constitutional law is therefore law in the strict sense of the term.

### 2.2.4. International Law

**Jeremy Bentham** coined the word International Law that was formerly called as the Law of Nations.

According to **Lord Russel Kiloween** International Law means 'some of the rules or usages which civilized states have agreed shall be binding upon them in their dealings with one another". Hence, the law of Nations or International law deals with rules for the governance of sovereign states in their relations and conduct towards one another.

Eminent jurist **Wheaten** defines International Law as "the body of rules which by custom or treaty civilized states regard as binding upon themselves in their relation with one another and whose violation gives the injured party a legal right to redress."

Now the question is whether international law is law in the strict sense. We have already seen that Austin has refused to recognize constitutional law itself as law in the strict sense. In that view if the definition of law is applied as laid down by Austin, International Law is not law in the strict sense, for him law is the command of the sovereign and international law can hardly be the command of a sovereign as in international relation there is no superior controlling inferiors. All are equal. John Austin, Willoughby and Holland

regard International Law as positive morality or as merely moral Code of Nations and they refused to recognize International Law as Law properly so called Holland described International Law as "the Vanishing point of jurisprudence". Positive law is the body of rules set and enforced by sovereign political authority. In that sense International Law, however is not set of rules enforced by a superior state controlling other states, As far as International Law is concerned as seen from the definition, all states are equal irrespective of their resources and Power. There is no overriding coercive authority over and above the states. There are only two factors, according to Holland they are. 1) Public opinion (2) the force and opinion of disputant states which make the enforcement of international rules possible. Moreover, International tribunals have no force to compel a state to abide by its authority. So, those jurists concur international law is at best not law properly called and they are only political and moral postulates. In order to bring International law within the purview of law.

Oppenhim defines international law as 'body of rule for human conduct within a community which by common consent of this community shall be enforced by external power. By this definition Oppenhiem brings out three essential ingredients for existence of law. Firstly, there shall be a community. Secondly there shall be rules for human conduct and thirdly there shall be common consent of the community for this enforcement by force. In that sense he says international law in the strict sense as the community of States have agreed to follow a set of rules for regulating their conduct and have also given consent for its enforcement against the recalcitrant state. It may be a weak law, nevertheless still have binding according to Oppenheim.

According to Salmond international law is a kind of conventional law and this view received the greatest support from English Courts. According to him one of the branches of international law i.e. prize law is law in the strict sense as its rules are recognized and applied by Courts of the land in the administration of justice. He says that barring Prize law, the rest of international law does not satisfy the test of Civil Law. So he opined international law could be treated as a special kind of law, as conventional law as being the result of agreement among

(Space for Hints)

sovereign states. So, Salmond concludes that is should be regarded as a species of conventional law. The some jurists defines international law is a kind of customary law. According to them Salmond's custom serves only as evidence of the existence of international agreement, which is the true source of International law.

As present it is dangerous not to consider international law as a law as one jurist remarks. "The precarious validity of the law of Nations on which the very existence of nations and civilizations itself depends would become year more precarious if its is not defined as international law". It is a task for statement to enlist might on the side of right and thus achieve the triumph of international justice by effective vindication of the place of International Law.

### 2.2.5. Imperative Law

Imperative Law is command on a rule in the form of a command, which enforced by some superior power. So law is the produce to the sovereign. 'If there is no soverign there can be no law. The imperative theory of law was propounded by Austin author of analytical school of jurisprudence

### 2.2.6. Kinds of Law

#### 1. General Law and special Law

The whole body of the law or the corpus juris can be divided into general law and special law. The general law is the territorial law the law which applies to all persons, all things all acts and all events within the territory. For example, Indian penal code. Whereas, the special law does not so apply and has effect only in a part of the territory or in a particular locality. In India the important kinds of special laws are the personal laws of the Hindus and Mohammedans.

Salmond mentions six kinds of special laws: They are 1) Local law; 2) The conflict of laws; 3) Conventional law; 4) Autonomic law; 5) Martial law; 6) Prize law. We have already discussed conventional law and autonomic law.

**Check Your Progress**

1. State the difference between General Law and Special Law?

**1) Local law:** It is the law which has the force of law only in a particular locality. It may be local customary law or local enacted law such as the law made by local legislative authorities such as the Panchayat, Municipality etc.

**2) The conflict of laws:** Justice and expediency require some times that the municipal court apply a rule of foreign law to determine the rights and liabilities of the litigants before it. This a necessity when the dispute before the court involves a foreign element. A contract entered into in England may be sought to be enforced in India. It is but just that the dispute be settled in a accordance with a rule of English rather than Indian law. This conflict of law's is sometimes called private international law.

**3) Martial law :** This is the law applied by court martial in the administration of military justice. Martial law is divisible into three kinds: a) the law which governs the army itself; b) the law with which the army governs its realm in times of war and c) the law with which the army governs occupied territory in times of war. So military law is one kind of martial law. They differ from each other in the source, person on whom it applies and the time during which it operates.

**4) Prize law :** This law regulates the practice of the capture of ships and cargoes at sea in times of war. In times of war, a nation that wishes to exercise this right of capture sets up within its common tribunals called prize courts. These courts decide upon the legality or otherwise of the captures and seizures of sea. Prize courts being municipal courts, the law applied to decide the disputes before them even if it be the law common to the nations concerned, is very much a part of the civil law.

**2. Public law and private law :** The laws of a modern state may be divided into public law and private law. Salmond defines public law as public law is not the whole of the law that is applicable to the state and to its relation with the subjects, but only those parts of it which are different from the private law concerning the subject of the state and their relations and to each other. Private law will naturally be the residue of the law after we substract public law.

(Space for Hints)

According to the definition of Salmond, public law will be that part of the law which deals with the constitution and working of the state and the functions of its various administrative department. So constitutional law and administrative law will be public law.

Private law on the other hand is that portion of the law which governs the subjects in their dealing with one another together with the rules which are common to both the subjects and the state. It must be noted that in many of its actions and relations there is no difference between the state and its subjects. For instance the state is an employer an owner of land and chattels, enters, into contracts and so on. Private law is made up of three branches, the law of property, the law of obligations and the law of states.

There are two kinds of laws which fall neither under public law, nor under private law and they are criminal procedure and civil procedure. Both are enforced in the courts and regulate the procedure of courts, the agents of the sovereign and the convict is punished by the state in the name of the state, nevertheless they cannot be designated as public law because they are concerned with the enforcement of private rights. So they are regarded as both public and private law. They lie on the borderline between public law and private law. Justice according to law, or the administration of justice in accordance with fixed rules of law.

The administration of justice is maintenance of right within a political community by means of the physical force of the state. This physical force of the state cannot be applied by the state directly, but only indirectly through the courts which is an instrument.

## 2.3.THEORIES REGARDING KINDS OF LAW

### 2.3.1. Imperative theory of Law (or) Austinian Theory of Law

**Check Your Progress**

2. What is Imperative theory of law?

The imperative theory of law was propounded by Austin and the analytical school of jurisprudence. Austin and his theory have an important place in our study of jurisprudence. Because Austin's analytical jurisprudence is the English school. Since our legal system and much of our laws are borrowed from England, it is analytical jurisprudence which holds away here in India. This

theory distinguishes a legal rule from that of other rules and define law according to formal criteria. According to Austin, law is in the nature of command. It is laid down by a political sovereign and is enforceable by a sanction. Austin says "positive law consists of commands, set as general rules of conduct by a sovereign to a member or members of the independent political society wherein the author of the law is supreme" According to him nothing commanded by any one but the supreme authority is law. He also says a sovereign is a person or body of persons, whom the bulk of the member of a political society habitually obeys and who does not himself habitually obey some other persons or persons.

From the above it is clear that to Austin a legal rule consists of two parts viz, as a general command stating legal requirements and a sanction behind it entailing punishment in case of disobedience by a recalcitrant person. Further to say a command to be a law, it should be a general command issued by the sovereign to persons generally to do or forbear from doing a class of act distinguished from a single or isolated act which is a particular command, So law is a rule made by the state or sovereign imposed by the state enforced by the State and breach of these rules of law is punished by the State.

It is well for a student to know that when Austin says law is a rule made by the state. Austin only means, what ever the rule is or by whom so ever it is made, or whatever its sources. That rule to be a legal rule should be recognized by the state. In this way that rule can truly be said to be made by the state, as it has the sanction of the state

For an example, custom is not a legal rule to Austin. It becomes a legal or customary law only when there is the will of the state behind it, Austin therefore in his imperative definition law emphasis the enforcement aspect of law the force of the state.

### Criticism

Austin's Theory was criticized by various authors According to the historical jurists Sir Henry Maine and those belonging to the historical school the theory is suitable only with regard to nature of jurisprudence. To them, law is not linked with that of sovereignty and so the theory is historically false.

(Space for Hints)

Maine observe although the definition of law, as the command of the state is possible and is at first sight sufficient as applied to be developed in political societies in modern time, yet it is not true with more primitive societies, Early law is not a command of the State. It has its source in custom, religion or public opinion and not in any authority vested in a political superior. It is not until a comparatively late state of recital evolution that law assumes its modern form and is recognized as a product of supreme power governing a body politic, Law is prior to and independent of political authority and enforcement. It is enforced by the state because it is already law and not vice versa.

On the other hand, the supporters of the modern theory of positivism answer the above criticism by saying that Austin in concerned only with mature system of law of modern States The law would have been derived from ancient rules and those rules may reassemble law and also may be a substitute for law but they are not themselves law. So the Imperative theory cannot be applied to the law of primitive times and the Middle Ages.

But students please to note that in an earlier lesson I told you that Austin belongs to the positive school. He is a positivist dealing with law *as it is* not with law as it was or as it ought to be. So his definition of law as the command of the sovereign is a definition of law of modern states. Also at the enforcement aspect of law. So we can truly say that by and large law is imperative, because the true lawgiver according to Bishop Headley is "not he who first wrote or shock the law, but he who enforces it as law'. But I just tell you that there are many kinds of law which are unsupported by sanctions, for example, permissive, enabling and declaratory statutes, law repealing other laws, international law. Criminal law is outstanding imperative always supported by a sanction please do not think that sanction means only corporate punishment; any evil consequence on the breach of legal rules is a sanction. Fines, injunctions, imprisonment etc, are all sanctions.

Salmond has also criticised Austin's definition of law and he states that he has eliminated ethical aspect from the definition of law and unduly stressed the imperative aspect of law. Let me quote here one of the most beautiful quotations of Salmond which deals with this criticism, he says of law. **"Law is not right**

**alone or might alone, but the perfect union of the Two. It is justice speaking to man by the voice of the state".**

The theory has not taken into consideration according to Salmond, the purpose of law. The purpose of law is to administer justice. So there is a close relation between law and justice. Law is the end. Courts of law are courts of justice. All legal principles are not commands of the State and even those that are such commands from courts are at the same time in their essential nature something more of which the imperative theory takes no account.

Before concluding the discussion about imperative theory of law it is necessary for us to understand the terms 'the law and a law'. Austin says that positive law is the "aggregate of the rules established by political superior". Whereas Salmond demonstrates this view of Austin as incorrect. The law of a country in its abstract sense means a whole system that orders each conduct and it represents the whole body of rules recognized and applied by Courts example the common Law. But each rule that we call as the law is only part of the whole law. According to Salmond, "all law is not produced by law and laws do not produce law". In that sense a law usually means law arising out of states legislative authority and it is only one of the sources of law. There are other sources like judicial precedent and custom and they are also recognized as authoritative sources of law and produce law and order for out conduct. These laws are also applied by the Courts though they are not enacted law. Hence all law is not produced by law Whereas, generally though law is produced by enactment, all acts of parliament do not formulate rules of law. There are exceptions to it. For example, as far as English system is concerned prior to the Matrimonial Causes Act 1967 a divorce was obtained only by means of a private Act of Parliament. This created no law. But, when a divorce was granted. under the act of the Parliament it creates law. "So laws do not produce law, so all law is not produced by laws and laws do not produce law".

### 2.3.2. Salmond's Definition of Law

Salmond is another eminent jurist who has defined law and he has defined the law in terms of the purpose of the law.

(Space for Hints)

He says, "law may be defined as the principles recognized and applied by the state in the administration of justice". This definition is in line with that of the supporters of the realistic school of law. Professor Gray and Holmes According to Salmond all law is not made by the legislatures. In England much of it is made by law courts, all law however made is recognized and administered by Courts and no rules are recognized and administered by Courts and not legislature that we must look in order to ascertain the true nature of the law. Salmond further explains that only when the principles of custom and statutes are recognized by Court in the administration of justice, the rules are recognized as having legal character. Salmond considers that if the highest Court of a state were wilfully to misconstrue an Act of the legislature. The interpretation so placed on that Act would *ipsofacto* be the law since there is no other authority to question such an interpretation. He has defined law in the abstract sense and according to him justice is the end and law is the instrument by which justice can be administered and maintained in a society.

From the above discussion it is clear that Salmond gives importance to the courts as the true law given in the sense the law that is ultimately binding is the law that proceeds from the courts of law, whether it is statute law or customary law.

**Criticism**

Salmond has explained law in terms of its purpose . The other jurists have leveled criticisms against the said view of Salmond. Vinogradoff often criticized Salmond by saying. "the direct purpose for which judges act is, after all the application of law starting from their action would therefore be somewhat like the definition of a motor car as vehicle driven by a chauffeur. He also further criticises the definition by saying "what should we think of a definition of medicine as a drug prescribed by a doctor". He says the very purpose of the law is administration of justice and so feels that it is not a definition to say that the law is for the purpose of doing justice. He has only explained the function of the law function of the court and has not given a definition of law. Vinogradoff also feels that Courts apply the law because it is already a law. He says that it is logically incorrect to say that a rule acquires the character of law only on the

(Space for Hints)

ground that it has been applied by the court. Fortunately Salmond himself answers the criticism by saying that he has defined law as instrument that has been used for ends of justice and there is nothing wrong in defining the thing as an instrument with regard to its ends it is a means by which the end is achieved.

Salmond's definition gives prominence to judicial action and this definition has the support of the Realistic School of America. According to Cardoza "law is the aggregate of rules recognized and acted on by Courts of justice". His definition defines law in terms of "the law". Another eminent jurist Professor Gray has defined law as "the law of the State or of any organized body of men is composed of rules which courts... Lay down for the determination of legal rights and duties". This definition is an improvement over Salmond's definition and the Realists have pushed this definition to its logical conclusion and according to them law consists of rules which the courts will probably recognize and act upon.

Salmond's definition takes in its fold Constitutional law as law in the strict sense, whereas Austin's definition refuses to recognize both Constitutional law and International law as law in the strict sense.

### 2.3.3. Kelson's Pure Theory of Law

Kelson's view of law is against the modern schools which have so far widened the boundaries of jurisprudence. Thus he is a philosopher in revolt from the tendencies to which philosophy has led so many writers. He desires to create pure science of law stripped of irrelevant materials in order to separate jurists from the social sciences as rigorously as did the analysts. Kelson refuses to define law as a command for that he introduces subjective and political considerations and he wishes that his study be truly objective. He says jurisprudence is a normative science as distinguished from natural science. In natural science we have statements of cause and effect and there is no question of infraction of that statement. If there is any infraction, then that is not a scientific rule. As far as jurisprudence is concerned we do not have casual connection between cause and effect. There may be interaction of a particular rule and yet law remains valid even when they are infringed and even when consequence does not follow. He makes no distinction between state and laws. As pointed out

**Check Your Progress**

3. Discuss the Kelson's pure theory of Law.

(Space for Hints)

earlier, lawness of a particular rule has to be decided from by hypothesis 'ground norm' or fundamental norm. This 'ground norm' is not derived from any science of law. It is an initial hypothesis from which all laws spring. The lawness of a particular norm will de decided by considering whether or not ultimately it is traceable to the 'ground norm', as lawness of a norm is not dependent upon meta-legal facts, but has its own specialty and relation in legal order. This theory of Kelson is called *pure theory of law*. This theory has nothing to do wither with social facts or with the high principles of justice. It recognizes Constitutional and International law as law in the strict sense. He makes of dichotomy between private law and public law as he eliminates the concept of sovereignty and State as a distinct entity. He also recognized customary law as law in the strict sense which Austin denies.

Kelson's theory also faced criticisms in the hands of leading jurists when he opined that the validity of each norm depended on its being laid down in accordance with a superior norm. In this view Kelson's theory is a distinct improvement and cleared many of the pitfalls of Austin's theory as this identification of state with the legal order is not acceptable to all the jurists. He has only given a back door recognition to Internal law to the legal order. He fails to note that a state has to operate even outside the ambit of legal order and identification of order and legal state is not justified. The aim of pure science of law is narrow one and it must be complemented by with other broader approaches

As far as English jurisprudence is concerned in the concrete sense a law means a statute, ordinance, decree of an Act of the legislature in the abstract sense, the subject of law ie., law of the State, is the entire body of legal principles prevailing in particular system.

Bentham defines 'Law' or 'the Law', as taken indefinitely in an abstract or collective term, which, when it means anything can mean, neither more nor less than the sum total of a number of individual laws taken together. "But his assertion is true as far as the English term of law is concerned; but there is no equal term for law in other languages. The term Jus, Recht, Droit as used in continental countries cannot in fact be said to express nothing more than the sum total of a number of individual law taken together. In continental languages, these

words may mean law, right or justice. But, The English term law is free from any suggestion of the aggregate rights or of the aggregate just things. According to Hindu idea, the sanction of Dharma contained law. It applied to all whether he be a king or a poor citizen. In this sense law is Dharma and dharma is law.

The next question we have to consider is whether it is necessary to provide a definition of law to under stage a subject. It may be argued that no legal judgement hinges on the definition of law. Vast majority of legal problems entails no reference to the concept of law. Hence, without a function of law, practical problems can be solved but the questions like whether unjust law is law or whether international law is law are questions of more than theoretical importance. In this circumstances the definition of law has practical significance. It is the basic concept of jurisprudence and its analysis is relevant to that of all other legal concepts. For example, legal rights have to be distinguished from other rights, possession in law from possession in fact and so on.

A traditional method of definition is not sufficient. As far as the traditional method a thing is defined by specifying it or describing it and then the same is distinguished from other members of that class. For the above said reason no neat and simple definition of law is possible. As stated by Salmond, what is necessary is to bring out the salient features of legal systems and to furnish us with an insight into the nature, function and operation of law.

## 2.4. ADMINISTRATION OF JUSTICE THROUGH LAW

Some jurists argue that there should not be fixed rules of law for administration of justice. There is no need for a legal system just appoint judges and give them the absolute power to decide cases in accordance with their own notions of right and wrong applying principles of natural justice ethics etc., or let them even decide cases according to their hunch. But let me tell you, that in all societies, not made of mere barbarians there are well settled rules of law in accordance with which justice is administered.

The advantages of administering justice in accordance with fixed rules of law are many. They are 1) Law sets up a standard pattern of conduct. Thus we

(Space for Hints)

known beforehand how to behaviour society what is to be done and what is to be avoided (ii) it guides the judge to decision. The judge has to decide only in accordance with well settled principles of law. It is only in those novel cases when there is no fixed rule of law by means of which he can decide a case, he is given the liberty with certain limits to formulate a new principle of law to decide the instant case before him. (iii) it helps the lawyer to predict the course which the administration of justice will take (iv) when laws are known definite permanent, it imports uniformity and certainty to the administration of justice (v) fixed rule of law promote the impartial administration of justice. The law is the same for everybody. The judge cannot show favour to one and disfavour to another as respect for persons is incomparable with justice. To quote Cicero: We are the slaves of law that we may be free (vi) law secures against errors of individual judgements i.e. discretion of individual judges in deciding cases is kept to the minimum because the judge has to decide in accordance with fixed rules of law. To quote a famous writer. The law is not always wise, but on the whole and in the long run, it is wiser than those who administer it.

**It may be permitted to add :** *Optima sequelae minimum relinquish arbitrio judicis, optimus judex qui minimum sibs* which means that system of law is bet which confides as little as possible to the discretion of a judge. That judge is best who relies as little as possible on his own opinion vii) fixed rules are checks upon judge. His decision is open to the criticism of the trained profession and because the decisions find a place in public records and law reports they are open to the criticism of the public and his decisions are also reviewable by superior tribunals.

But these advantages are obtained at a heavy cost according to Salmond. He observes: The law is without doubt a remedy for greater evils, yet it brings with its evils of its own.

The defects i) it is said to be too rigid, too hard and fast. Enough scope is not given to a judge to use his own discretion or his own power, of reasoning in deciding cases. So sometimes hardship and injustice may be caused to an individual. Fixed rules of law applied rigidly may cause hardship summum just summum injuria i.e., extreme law is extreme injury. But that cannot be

helped, if we want the administration of justice to be impartial, then we must have general rules only and be prepared to pay the price.

ii) It is conservative, narrow and pedantic. The existing law is not always in harmony with the needs of the people and very often does not take of the changed ideas of truth and justice. So it is left to the judges by their decisions to fill in the gap.

iii) Formalism is said to be a vice. Too much importance to rules of evidence, procedure and administrative law affects the substantive rights and wrongs.

iv) There is too much of law a morbid growth. But as life becomes more and more complicated and there is growth in population and so much of human change and progress, there is bound to be a morbid growth of the law.

**Law and Equity:** The history of English equity will be dealt with in the lesson in Ancient law. So far the purpose of comparing equity or chancery law, with law or common law it will be enough if the student is made aware of the fact that before the passing of the judicature act of 1873-75, in England two rival system of law were administered side by side but in rival courts. One was the old law, the common law administered in courts of common law and equity developed and administered by the chancellor in the court of chancery. The common law courts were three in number. The Kings Bench, Court of common pleas and the court of Exchequer.

The existing law, viz the common law had by the thirteenth and fourteenth centuries become so rigid and stereotyped that they could not more serve the needs of a dynamic society and so the chancellor developed the principles of equity. When equity was developed the ideas was not to override the common law, but merely to correct its defects, and to supplement the common law, and the maxim was acquitas sequitur legmen means equity always followed the law. So to a large extent both the systems were harmoniously applying the same rules of law to similar facts and rendering similar decisions. But to a small extent they were discordant, for different rules, could be applied when would result in dissimilar judgments. This was due to the fact that the chancellor in the early days was unbound by rule and precedent. He decided every case on its own

(Space for Hints) merits taking into consideration the hardship that would be caused in individual case, and the law supplied was not a fixed rule of law but principles of good faith, good conscience, natural justice and equity. The courts of chancery were courts of conscience, a simple illustration will make this quite clear. Common law stressed on form but not so equity. So there was no relief in case of accident, fraud, misrepresentation etc. in courts of common law. But courts of equity provided relief in such cases as well.

The Judicature act was enacted in order to bring about fusion of the two systems of law, but all it resulted in, was a fashion of the two systems of courts into one called the high court of justice keeping alive all the difference between common law and equity. A some jurist remarked; The two streams of jurisprudence, though they run in the same channel, these waters do not mingle.

To Salmond the term equity can be used in three senses:

a) According to its first meaning equity is a synonym for natural justice, acquities is acquittals, a fiar, impartial, equal, allotment of good and evil. In this sense equity is nothing but principles of natural justice and fair play and was developed to make the common law just and humane. But this definition of equity is objected to naturally. The objectors argue that if equity is natural justice then it means the common law which is the opposite of equity, cannot be natural justice. But that is not true for common law the ordinary law of the land which has survived through the ages also endeavours to make its rules just and human. There are a number of classical examples in proof thereof, for example, the presumption of innocence of the accused until he is proved guilty and the prerogative of pardon just to mention a few. So Maitland defines equity in a technical sense it is that portion of natural justice which was emitted to be enforced in the courts of common law, and which owing to historical reasons was developed in England in court of chancery.

In a second sense equity means again natural justice and as natural justice equity is equitable law as opposed to the inflexible rules of law, which is the general law of the land. Acquittals is constructed to summum jus or stricken jus. The general law of the land is infeasible because it lays down general principles only in order to administer justice impartially. It does not take note of the

hardship caused to individual cases whereas, equity is equitable law. As already told earlier there are no fixed rules of law in the courts of equity. The Chancellor applied good faith good conscience and principles of natural justice to the case before him and saw to it that no hardship was caused to any individual. So Aristotle defines equity as the correction of the law whereas it is defective on account of its generality.

The third meaning of equity, is not contrasted to common law; it is only a system of law. Equity is administered in the court of chancery and is therefore, called Chancery law, whilst common law, is administered in courts which is to be called common law courts.

**Law and Facts:** In any litigation the court has to do distinct process. Firstly, to find the facts and then to apply the law' or in other words the judge is involved while deciding a case with questions of fact and questions of law. The line which divide them is so thin as to be almost invisible, as it is so difficult to define these two with and great exactitude. Law consists of the abstract rules which attempt to reduce to order the teaming facts of life. On the other hand facts are the raw materials on the basis of which the law create, certain rights and duties from these two definitions it is quite clear that law is nothing but a progressive transformation of facts into law.

Salmond uses the two terms Law and fact or questions of law and questions of fact in three distinct but related senses.

1) In the first sense, all matters on which there are already well established rules binding the courts are questions of law. These established rules may be rules of statute law, or judiciary law or customary law or conventions law. So along as any one of these rules cover the facts of the case before him and the rule is binding on the court, discretion of judge is completely ruled out. He has to simply apply that law and decide accordingly.

All other questions or matters not covered by a well established principle or rule of law are questions of fact in the first sense of the term.

If a child accused of a crime has sufficient mental capacity to be criminally responsible for his act, is one of fact if the child is over seven years,

(Space for Hints) but one of law if he is under that age. Because, if he is under seven then the conclusive presumption cannot be rebutted, however precocious the child may be.

2) In the second sense, a question of law is a question as to what the law is. Thus questions of law in this sense may arise in two ways firstly, because of the absence of law to decide the instant case before him. When a novel case comes before the judge, he naturally asks the question what is the law. He has to necessarily formulate a new principle of law in order to decide the matter before him. He cannot create a new principle of law from in vacuo: any principle evolved by him must be relevant to the case before him and therefore based on the facts of the case. He therefore, ascertains the relevant facts of the case, and on these facts and the conclusion he arrives at, he formulates a principle of law and authoritatively lays down for the first time, that the principle will be applicable to that particular set of facts.

This authoritative pronouncement of the judge, if the judge happens to be a judge of a superior tribunal, will become a question of law for all future similar cases. So law is the progressive transformation of questions of fact into questions of law.

Secondly questions of law may arise due to an ambiguity in statute law. The judge in such a case is to carefully interpret the statue to find the underlying meaning or the intention of the legislature. This the judge does by constructing every word used in the statute, and gives an authoritative pronouncement as to the law contained in that statue or statutory provision which will be followed in future. So a question of law is again found to be progressive transformation of the question of facts as to the meaning of that statute into questions of law.

In the second sense any matter which does not necessitate the question as to what the law is, will be a question of fact, for example all extraneous and irrelevant matter, not vital to the issue in hand.

3) Third sense in which questions of law and questions of fact are used are peculiar to jury trials. Questions of law are matters left to the decision of the judge. Questions of facts to the jurors. Whether the accused is guilty or not is a question of fact to be decided by the jurors on the evidence they have heard

during the trial and they return the verdict to be given by the jurors, then it becomes a question of law for the judge to apply to law and pronounce his judgement.

**Law and laws:** The terms law and laws are used in two sense. We commonly speak of the Indian law or English law, or the laws of India or the laws of England. They connote two aspects of the legal system.

The laws of a country in its concrete sense are thought of separate, distinct, individual rules. Whereas the law of the country to its abstract sense denotes the whole legal system. Thus each rule which we call a law is part of the whole we call the law. A law may mean some particular species of law as a statute, act of parliament etc., and the idea of justice which is a necessary element of law is ignored, whereas, the law in its abstract sense to mean the entire body of doctrine. English writers frequently try to find the answer to what a law is, rather than to what the law is forgetting that the central idea of judicial theory is not les but jus, gesetz; but racht, (lex-a law; jus-justice; gestic a law rach-justice). This may be due to the fact that they belong to the analytical school.

Another distinction between law and laws is laws have definite beginning and independent existence and of the most part are acts of parliament and other statues. But the law has no definite beginning it has grown rather than been made, for example, common law.

**Nature of Territorial law:** We think and speak of law as territorial. We speak not of the law of the courts of England or India but the law of England or India. Therefore, it is necessary for us to look into the territorial nature of law. Its two aspects are the territorial enforcement of law and the territoriality of law.

**Enforcement of Territorial law:** This means that the laws of a state can be enforced within the state only. Its power does not extend beyond its territory. If a person commits a crime or a tort in one state and flees to another, the long arm of the former state cannot reach him in the latter state. It is only by means of extradition treaties, the state concerned agrees to surrender to the other the fugitive from its criminal law found in its territory. In civil wrongs, the municipal court as a general rule give remedy wherever the may be committed.

Territoriality of law: The only possible explanation to this aspect of the law is that its operation itself is territorial. It means that the laws of any one particular state, applies to all persons, things, acts and events within that territory, and odes not apply to persons things, acts or events elsewhere; for example criminal law, law of marriage, divorce, succession and domestic relations are territorial in operation. To this general rule there are certain exceptions 1) the state can apply its criminal law to crimes committed elsewhere, other than in its territory by its nationals or against them. 2) English court of equity will apply certain equitable rules even to land situated abroad and 3) the law of torts has no territorial limitation. These cases introduce an extra territorial element into the nature and operation of law.

In India much of the law, relating to succession, divorce marriage and even land laws are the laws of personal status, not thee ex loci. The law administered by the consular court abroad was regarded as the personal law of that nation. This introduced an extra territorial element in the administration of the national law.

## 2.5. THE STATE

The laws which are the subject matter of jurisprudence are exclusively formulated and enforced by a very special kind of society called the state. The society called as state has certain unique characteristics which help to distinguish it from all other societies of men such as religious or cultural societies.

Characteristics of a state: first, the state occupies a definite territory. It not only occupies a definite territory, the state claims exclusive and permanent control over that definite territory. It tolerates no alien interference. Thus the state is externally sovereign and preserves that sovereignty, by not rendering habitual obedience to any external power.

But Salmond's theory is that a territorial basis is not an essential condition to the existence of a state. He observes. This exclusive possession of a defined territory is a characteristics feature of all civilized and normal states. But we cannot say that it is external to the existence of a state. A state without a fixed territory, a nomadic tribe for example, is perfectly possible. A non-territorial

(Space for Hints)

society may be organized for the fulfillment of the essential function of government and if so, it will be a true state. But universal sovereignty has been way to modern territorial sovereignty and so modern international law will not recognize a community however organized it might he as a state if it does not occupy and control a definite territory, as it is more concerned with territorial state.

Secondly population is essential for every state. This population must be or organized into one for political end. To achieve these political ends the state sets up a system of government which establishes permanent institutions such as a legislature, the judiciary and the executive to exercise governmental control and an armed force or forces to prevent external aggression.

Thirdly, the political ends for which the state exists, and the control it can exercise over its members, are, vast, general and undefined. The state thus exercises control both internally and externally through law and government.

**Definition of the state:**

**Mac Iver :** A state is an association which, acting through law as promulgated by a government endowed to this end with coercive power maintains within its community territorially demarcated the universal condition of social order.

**Woodro Wilson:** A state is a people organized for law within a definite territory.

**Salmond :** A state is a society of man established for the maintenance of order and justice within a definite territory by way of force.

In all the above three definitions one will notice, certain essential characteristic of a state, viz. population, organizations, definite territory and its purpose being to achieve political ends through an established order. These definitions also give us a conception of the minimum function, that of maintaining a social order, or social by suppressing its foes both internal and external through its laws.

**Check Your Progress**

4. Define State. What are the characteristic s of a state?

(Space for Hints)

**The functions of the state:** A broad division of functions will be into primary or essential and secondary functions. A) Primary or essential functions. To Salmond the fundamental purpose and end of political society has been, defense against external enemies and the maintenance of peaceable and orderly relations within the community itself. Every society which perform these two functions is a state and none in such which does not perform them. The observation of Salmond gives us a clear picture of what should be the essential or primary functions of the state. They are war and the administration of justice. But it was not unlike and Salmond to contradict himself for himself i) The component units of a federal state like the U.S.A. and the republic of India for that matter are themselves state. Each constituent unit in these federal states called a state it rectifies the definition of a state and functions as a state with its own governmental machinery, such as legislature, a judiciary, an executive and a police force. They also possess sovereign powers. Yet they do not have the power to wage war, which power is strictly reserved by the constitution to the central or federal authority. As against this argument of Salmond it can be successfully argued that these units have not international status. They are merely portion of a larger whole.

It is Salmond's opinion that welfare becomes more and more destructive. States may abandon the idea of welfare and yet be called states, or an international order may be up by which war will entirely disappear. This no doubt is the ideal but as things are today one is afraid such an international order can but be only wishful thinking. But surprisingly Salmond fails to realize that was does not mean an offensive war, it also means to be in a state of preparedness to resist external aggression. Switzerland which has declared for itself neutrality has hardly abandoned the idea of welfare. Every able bodied man and woman are given the training such that if and when necessity arises they will be fully prepared to defend the territorial integrity of their state.

Even granted that a time comes when such international order as envisaged by Salmond is set up and the idea of warfare is abandonment still we can hardly imagine a state that abandons the administration of justice, for the very purpose of organization is to establish a social order within the community. Professor A. L. Goodhart has said of a state. The purpose of society which we

(Space for Hints)

call a state is to maintain peace and order within a demarcated territory, it would be impossible to maintain social life above the bare minimum without an organization which prevents the use of force by one person against another. Aristotle's conception of the state, is the same. A state exists that man may lead a good life. Life outside a state organization would be to put it in the words of Hobbes Short, nasty and brutish. Aristotle organize themselves into communities set up a central authority and vest in this authority the right to enforce its laws. This central authority guarantees, the happiness of the members by the impartial administration of justice. The administration of justice may be defined as the judicial application of the force of the state in the maintenance of right internally or within the state.

In order to survive a state must preserve its independence. Says Herbert Spencer. The true functions of the state are to protect against external enemies and to suppress internal anarchy. Austin calls these the negative and positive marks of Statehood or sovereignty.

The positive mark is that the strength of the central authority must be absolute in its own sphere. It must have the absolute power of control over all t he members and the bulk of such members should tender its habitual obedience. For stability the bulk of the community need alone render its habitual obedience, but in every society, however well ordered that society might be, there is always a recalcitrant minority which is likely to create conflicts and chaos, so the state must have the power to control them. This it does by the administration of justice. Thus the state preserves its internal sovereignty of independence by the impartial administration justice.

The negative mark of statehood is that the central authority should not be in the habit of obeying any other power. So the central authority has to take measures to expel external aggression. So the central authority should be both externally and internally sovereign. War which consists in the extra judicial use of the force of the state applied mostly external to the state and directly without any trial or adjudication also helps the state in the maintenance of right and justice by the physical force or might. Leviathan carries two words, the sword of war and that of justice. Hobbes.

(Space for Hints)

**Secondary functions:** Secondary functions, fall under two headings (a) secondary but essential functions, and b) secondary but unessential functions. The former are termed essential because they facilitate the fulfillment of the primary functions. They are legislation and taxation. As the latter, these are legion. In a welfare state, the state assumes into itself these secondary but unessential functions in the larger interest of the community. The state is a common carrier of letters, builds bridges, highway, ships provides for education, health, etc.

**The membership of the state:** The are two kinds of state membership. They are permanent and temporary membership. The two titles of state membership are citizenship and residence. The former is both personal and territorial. While the latter is only territorial which amounts to a bond between the state and the individual. In citizenship, the individual is a citizen or a subject. He or she may be natural born, or may became, such by process of naturalization or by unbroken residence i.e., by domicile; whereas, members by virtue or residence are recipient of a license who for the time being reside within the territory and so possess a temporary and merely territorial title to state membership. Both are members of the body politic owing obedience and allegiance to the state and its many dates; one permanently, the other temporarily and in return entitled to claim protection from the state. Citizens possess a few special rights not possessed by the other members of the state.

## 2.6. KINDS OF STATES:

States are either unitary or composite; a unitary state is one in which the totality of sovereign power renders only in one organ, it being a single undivided whole for all governmental purposes. It is this sovereign body, which may be composite body, which exercises dominion over the entire territory comprised within the state.

**Check Your Progress**

5. What are the different kinds of states.

England, New Zealand, France are unitary states. The entity of sovereign power in the British constitution residence in the imperial parliament of Great Britain. The powers possessed by the local bodies and other inferior organs as town councils. Country councils for making law is only conferred upon them by

the British parliament and as delegated powers go, at any time any power can be altered or revoked by the parliament the supreme authority in the state.

A federal state is a composite state made up of a number of constituted units or states. These states conform to the definition of a state and function as seen earlier.

A federal constitution is based on the doctrine of separation of powers, not only into legislative, judicial, executive sovereignty but the sovereign power of the entire state is divided by the constitution between state authorities have in them the entirety of sovereign power but only such shares of the sovereign power as are vested in them by the constitution, but each is supreme in its own sphere and should not assume not itself sovereign power vested in the others, that is to say, neither authority can transgress its constitutional limits.

The English doctrine of parliamentary supremacy, true of unitary states, is not true of federal constitutions. U.S.A. is a federal state. Secondly a federal state is a result of a compact among sovereign states, and therefore, has a written constitution, which is rigid and can be altered by special procedure only. Thirdly, the constitution is supreme and the courts alone can interpret the constitutions. The supreme court acts as the guardian of the constitution. It is the courts that pronounce upon the constitutionality of the acts of the federal authority and the state authorities. So the demarcation of power between the federal centre and its units is a justifiable demarcation.

**India-Quasi federal Constitution:** The Indian constitution proceeds upon a division of sovereign power between the centre and the government to the various constituent states, yet in practice it is otherwise. In times of emergency the president can always proclaim state of emergency and suspend the working of a state government and the union parliament can legislate for the state on matters found in the state legislative list. But this is not true of pure federal set up. In U.S.A. even in the state of emergency the federal government cannot suspend the working of the state government and the legislature cannot unilaterally legislate on those matters found on the state legislative lists.

Therefore the Indian constitution cannot be said to be a true federal constitution. It is said to be quasi-federal constitution.

(Space for Hints)

## 2.7. SOVEREIGNTY:

Sovereignty has always been a trouble spot in jurisprudence. Jethrow Brown puts it succinctly. The student who invades that tread domain, the literature of the doctrine of sovereignty finds himself in a world where difference of opinion are numerous and fundamental. One moment he learn that sovereignty is necessarily absolute, the next that it is eternally limited. Now he is told that in the nature of things sovereignty must be indivisible; now he is confronted with definite illustration of sovereignty which have been divided or abdicated. He it told by some that it is based on force, by others on will, by others on reason. If he is to ask where sovereignty resides, he is referred to persons or bodies of all kinds to an electorate, to governments, to constitution revising assemblies. To an electorate, to the popular majority to the body political.

Bodin is considered as the father of the modern theories of state and sovereignty. Austin analysed his theories in his own popular way to be called the Austin's theories of state and sovereignty.

**Austin's Theory on Sovereignty**

Austin's conception of sovereignty is if a determinate human superior, not in the habit of obedience to a like superior receives habitual obedience from the bulk of a given society that determinate superior is sovereign in that society and the society (including the superior) is a society political and independent. This definition is indicative of the two marks of the sovereignty the positive and the negative. The positive mark is, the bulk of the given society must be in the habit of obedience to a determinate and common superior. The negative mark is that the determinate superior must not render habitual obedience to some other determinate person or body. We are concerned only with the positive mark of sovereignty.

Austin's positive mark of sovereignty is taken up the Salmond and reduced it to three fundamental propositions which are as follows. Sovereignty within a state is essential. This is called the doctrine of essentiality 2) sovereignty is undivided and is indivisible. This is the doctrine of indivisibility 3) sovereignty is unlimited and illimitable. This is the doctrine of illimitability.

(Space for Hints)

So, Austin's theory is that in every state there should be sovereignty power and this sovereign power in undivided and indivisible and it is also unlimited and illimitable. But Salmond does not concur with this theory. He agrees with the first proposition that in every state there must be sovereign power, it is divisible and it is limited in extent.

Austin's theory is based on the nature of sovereignty found in the British Constitution. Let us critically examined this theory with reference to the nature of sovereign power found in the different constitutions of the world.

**Essentiality:** There can be no two views where this doctrine or essentiality is concerned. There has to be sovereign power in every political society for other wise all power would be subordinate. Men being what they are, there must be political authority to control them, otherwise life will be impossible.

**Indivisibility:** To Austin in every state there is only one person or one body of persons vested with the totality of sovereign power. This person or body does not share the sovereign power with any other person or body. Austin does not deny that this person or body may be composite in nature, in which arise the different parts of the sovereign body possess in nature, in which arise the different parts of the sovereign body possess the entire sovereign power as joint tenant of the whole. Salmond criticizes this doctrine and points out that the British Constitution is an instance of divided sovereignty. The sovereignty is divided into executive and legislative sovereignty. The executive sovereignty resides in the Crown, while the legislative sovereignty is vested in the two Houses of Parliament and the Crown.

Austin's theory of indivisible sovereignty is inapplicable even for a federal form of constitution. The very essence of federalism is the demarcation of sovereign power between the federal centre and the local government of the various constituent states. The division of sovereign power is brought about by the constitution itself. Sovereignty given to the federation and its units is divided into three branches, legislative executive and judicial and neither Federal Authority nor the state authorities can transgress the boundaries set up by the constitution.

**Check Your Progress**

6. Write a note Austin's theory of sovereignty?

(Space for Hints)

In the Indian constitution also, sovereign power is divided by the constitution between the centre and the constituent states. Further the sovereignty is split into executive and legislative sovereignty. Executive sovereignty is vested in the president of India. The legislative sovereignty in the parliament which comprises the president, the council of states and the House of the people. Although under the Indian constitution sovereignty is divided between the parliament at the centre and the state legislature yet in practice there is no such division of legislative sovereignty. The parliament is the sole repository of legislative sovereignty. It is thus clear that this doctrine of indivisibility is inapplicable to the nature of sovereignty found in the different constitutions under study.

**Illimitability:** The proposition means that to Austin the authority of the sovereign is free and uncontrolled and infinite in extent. Austin failed to realize that in every state there is a de facto sovereign or the body that receives obedience and a de jure sovereign the law making body. None can deny that de facto sovereign power is limited in extent. However powerful a government may be, its long arm cannot reach a fugitive to another state. So too there is always the possibility of resistance by the governed, a government cannot do what it desires, what it desires is largely predetermined. So far as international relations are concerned, every sovereign government is necessarily compelled to shape it policy so as to secure itself in its relation with other states. Physical impossibility is another limitation in fact. Even the British Parliament cannot make man a woman.

Austin may admit the limitation of de facto sovereign power. But denies de jure limitation. To him, in every state there is one person or one body of persons which has the unlimited power to make, alter or repeal laws. The sovereign is above the law and therefore, sovereign power cannot be controlled by law. So according to both Hobbes and Austin in seeking for the sovereignty it is necessary to discover the person who posses the power of making or repealing all laws without exception. He and he alone is the sovereign of the state for he necessarily has power over all and in all and is subject to none.

Although in theory the British Parliament has legislative omnipotence in the sense that the tribunals of the country cannot question an Act of Parliament nor can a statute passed by the Parliament be rejected as ultira vires yet in practice there was many factors which can separate as checks on an omnipotent legislature, for instance the parliament dare not to pass law that all blue eyed babies be killed. Secondly the press wields a great deal of power in England, which is another check on the legislative doctrine of the parliament. It is therefore, clear to us that Austin's doctrine of illimitability cannot be applied even to do jure sovereign in the British constitution.

Coming to the legislative sovereign in the federal constitution of the U.S.A. we find that neither the federal authority of the state authorities have the unrestricted power of repealing or altering the constitution. The federal constitution can be altered either by two thirds majority of the congress and ratified by the legislature of three fourths of the state or by conventions called for that purpose. A sovereign thus trammeled is a convention in terms. Thus Dicey calls both the federal and state legislatures as non sovereign law making bodies like corporations.

The Indian constitution also proceed upon a division of legislative power between the centre and the component units. But we have already seen that in practice the parliament is the sole repository of legislative sovereignty but it cannot be said that his legislative sovereignty is unlimited in extent. The parliament on his own cannot amend all provisions of the constitution. An amendment of certain provisions of the constitution can be done only if the amending bill passed by two thirds majority of parliament and ratified by legislature of not less than one half of the states.

**Legal and political sovereignty:** It is Dicey who draws clear distinction between the legal and political sovereign in a state. He defines the legal sovereign as the person from whom law emanates. To quote Bryce. The legal sovereign in the state is to be found in that authority be it to person or body whose will is not liable to be overruled by the expressed will of any or placed above him or it continues Bryce. The political sovereign in a state is that body the will of which is ultimately obeyed by the citizens of the state. So according to this definition in a democratic state the political sovereign is the electorate. As

legislature is not an organ of the electorate and cannot be controlled by it and as the courts do not take note of the will of the electorate as much the electoral body cannot be recognized as having a share in the legal sovereignty of the state.

## 2.8. SUMMARY

One section of Jurists attempted to define law, as the product of the state, yet others concentrated on the content of the law. There are other jurists who stress the function of the law in society and described functions of the law as it works in actual practice. From Austin to Salmond defined the law in different way and they also classified the laws into various types. Austin imperative Theory of Law distinguishes a legal rule from that of other rules and define law according to formal criteria. According to Austin, law is in the nature of command. It is laid down by a political sovereign and is enforceable by a sanction. Salmond is another eminent jurist who has defined law and he has defined the law in terms of the purpose of the law. In Kelson's Pure theory of Law, Kelson refuses to define law as a command for that he introduces subjective and political considerations and he wishes that his study be truly objective. He says jurisprudence is a normative science as distinguished from natural science.These theories are also face some criticism.

The jurists argue that there should not be fixed rules of law for administration of justice. There is no need for a legal system, just appoint judges and give them the absolute power to decide cases in accordance with their own notions of right and wrong applying principles of natural justice ethics etc., or let them even decide cases according to their hunch. But let me tell you, that in all societies, not made of mere barbarians there are well settled rules of law in accordance with which justice is administered. Various Jurists define state in their own view. The definitions also give us a conception of the minimum functions of a state, that of maintaining a social order, or social by suppressing its foes both internal and external through its laws

The next is Sovereignty. **Bodin** is considered as the father of the modern theories of state and sovereignty. Austin analysed his theories in his own popular way to be called the Austin's theories of state and sovereignty. Thus we have discussed in this lesson all these points in a detailed manner.

## 2.9. KEY WORDS

Territorial - domain

Aggregate - total

Sovereign - Superior

Indivisible - can not be divided

Quasi Federal - Neither Federal nor Unitary

## 2.10. ANSWER TO CYP QUESTIONS

For Question No. 1 - Refer section 2.2.6

For Question No. 2 - Refer section 2.3.1

For Question No. 3 - Refer section 2.3.3

For Question No. 4 - Refer section 2.5

For Question No. 5 - Refer section 2.6

For Question No. 6 - Refer section 2.7

## 2.11. MODEL QUESTIONS

**(A) Long Answer Questions**

1. Critically evaluate Austin's theory of sovereignty.
2. Critically evaluate Salmond's definition of law.
3. Distinguish between Law and equity.

**(B) Short Answer Questions**

1. Write a note on the Austin's definition of Law
2. Discuss Austin's Theory on Soverginity
3. Write short note on the following
   a) Law and Laws
   b) Law and Fact

# UNIT-3

# SOURCES OF LAW

## INTRODUCTION

The usual meaning of the word 'source' is origin or beginning but like many other terms used in jurisprudence, the word source has been employed with more than one meaning. The sovereign is entrusted with task of enforcing the law and administrating justice impartially within the state. The laws of state have different the sources and the term source has different meaning and can be used in different senses. In this lesson we are going to study the various sources of law.

## OBJECTIVES

- To understand the meaning of the term 'sources' through various authors.
- To know about Judicial precedents, their kinds and classification.
- To analyse various theories of Custom and Judiciary.

## UNIT STRUCTURE

3.1. Sources of Law

3.2. Salmond's four kind of law

3.3. Keeton's four kinds of law

3.4. The decision of foreign courts of justice

3.5. Legal or formal source of law

3.5.1. Custom

3.5.2. Out standing features of custom

3.5.3. Classification of Custom

3.5.4. Features of custom

3.5.5. Judicial test for Valid Custom

3.6. Judicial precedent

3.6.1. Classification of Precedent.

3.7. Ratio Decidenti and obiter dicta

3.7.1. How to locate the Ratio Decidendi ?

3.7.2. Dr. Goodhart's Material Facts Test

3.7.3. Doctrine of prospective overruling

3.8. Legislation

3.8.1. Subordinate legislation

3.8.2. Subsidary rule interpretation

3.9. Summary

3.10. Key words

3.11. Answer to CYP questions

3.12. Model Questions

## 3.1. MEANING OF THE TERM 'SOURCES'

Like many other terms used in jurisprudence the word 'sources' has been employed with more than one meaning. Text book writers have used the term to denote the following meaning .

**Keeton**

1. That final authority from which the validity of all laws is ultimately derived. In this sense the only source of law in modern communities is the state.

2. The means whereby a knowledge of the law is conveyed to an intelligent human being. In this sense the statute book, the law reports and text books are sources of law. But it would be more correct to say that these are sources of our knowledge of the law.

(Space for Hints)

3. The materials out of which the law is eventually fashioned through the activity of the judges. This is the only meaning which can properly attached to the term sources of law.

4. Sometimes the term is employed to denote the form or shape-in which the materials appear when they are molded by the judges.

**Patterson**

1. Literary materials which are to be found in the law libraries.

2. Authoritative forms which are the result of the acts and utterances of official and other agents of the state. These are authoritative source of law.

3. The things from which material content of prescription and the ideas that are expressed in the body of law are derived Austin gives three meaning of the term sources of law.

a) The direct or immediate author of law is the person or body of persons by whom the rule was originally formulated giving it the force of law. Such immediate sources can be:

1. A legislature or judiciary.

2. A political subordinate acting either as a legislature or judiciary.

3. persons whose conduct form custom.

4. persons who by conduct submit themselves to a rules of conduct towards each other.

**Austin :** According to Austin, sovereign is the source of all law and all law emanates either directly or circuitously from the sovereign. Though all laws are derived from the same source, indelicately and directly laws may have different authors.

b) The second meaning of the term source of law are the earliest or original text or documents form which the body of law may be know e.g. XII tables, corpus jurist civil etc.

**Check Your Progress**

1. Explain the meaning of the term 'sources' according to Keeton?

c) The third meaning of the term 'sources' denotes the causes which have been brought into existence rules which have subsequently acquired the force of law.

(Space for Hints)

Austin emphasizing the importance of sovereign for the existence of law came to the conclusion that sovereign is the exclusive source of law. Accordingly legislation is the most appropriate form of law since it expresses the will of a law giver. This is not true. Nobody today can assume that legislation is the only source of law.

**Holland:** The term source of law according to Holland has been used in four different senses.

1. The word is used to denote the quarter form where we obtain out knowledge of the law.

2. To denote the ultimate authority which gives them the sources of law.

3. To indicate the causes which have brought the rules into existence.

4. To indicate the organs through which the state grants legal recognition.

**Gray :** Gray maintained a strict distinction between what we called as the law on the one hand, and the sources of law on the other hand. To him law consists of rules authoritatively laid down by courts in their decisions while we looked for it sources in certain legal and non legal materials upon which the judges customarily fall back in fashioning rules which make up the law.

**Salmond :** He classified sources as either legal or historical. The former are those sources which are recognized as such by law itself and so binding *force.* Their binding force is complete. Legal sources are those which must be permitted to influence she growth of a legal system. Legal sources are authoritative and are allowed by the law courts as of right. They are the only gates through which new principles can find entrance in to the law.

**Check Your Progress**

2. What is the meaning of the term 'sources of law?'

Historical sources on the other hand lack formal recognition of the law. They are un authoritative. They cannot claim like legal sources that hey should be

(Space for Hints) allowed as a right. Thus historical sources operate only immediately ana indirectly. They are merely various precedent finds in the chain of which the ultimate link must be some legal source to which the rule of law is directly attached. All rules have historical sources. As a matter of fact and history they have their origin somewhere. But not all of the them have legal sources. To illustrate this point Salmond considers a rule of law which is based upon a precedent. The precedent itself may be founded upon the writings of Potheir, who may have drawn the materials from corpus Juris of Justinian who again may have derived them from Paretor's edict. In this example, the precedent is the sole legal source of law as far as English law is concerned while other are merely historical sources only.

Salmond's division of sources into legal and historical is a just one and an important one; but it is not a complete one. There are occasions when a judge is compelled to make a decision without the aid of any legal source of law, when he is thrown bank upon his own innate sense of right and wrong. In deciding such a case he will be subject to the influence of certain factors which are neither legal nor historical for they operate directly upon the minds of the judges and not immediately through the legal sources.

This difficulty of classifying sources of law is surrounded by classifying them into binding source of law and persuasive sources of law.

As against these views expressed by the jurists of the Analytical School, the historical jurists have taken an entirely new position. Thus Savingly the founder of the Historical School maintains law is the spontaneous evolution of the spirit of the particular people which we call as the Volkageist. The formulation of law has its existence in the common consciousness of the people which is manifested, in the practices, usages, customers of the people. Therefore, custom is the only source of law. To Savingly source of law meant the material form which law derives its content. Thus he disagreed with Analytical jurists that sovereign is the sole source of law.

Classified with reference to their legal source there are according to

(Space for Hints)

## 3.2. SALMOND'S FOUR KINDS OF LAW

a. Enacted law having its source is legislation.

b. Case law having its source in precedent.

c. Customary law having its source in custom.

d. Conventional law having its source in agreement (to be discussed under legal concepts).

## 3.3. KEETON'S FOUR KINDS OF LAW

Laws are Classified with reference to their historical or material source they are

a. Professional opinion.

b. Religion.

c. Principles of morality or equity.

d. Decisions of foreign courts of justice.

We will first take up **material or persuasive or historical source of law** for discussion before proceeding to the legal sources.

**a) *Professional Opinion*:** Professional opinion as a source of law has only persuasive authority only. The legal profession comprises three groups of persons the judges, practising lawyers, and the teachers of law and accordingly professional opinion as a source of law may be divided into the following classes.

a. Obiter dicta of the judges.

b. General opinions of legal profession.

c. The opinion of the writers upon legal subjects.

Obiter dicta are statement of law made by judges in the course of decision arises incidentally out of the circumstances of the case but not necessary for the decision. The value of such dicta as sources of law naturally varies a great deal depending either according to the reputation of the judge making them or

**Check Your Progress**

3. What are the four kinds of law according to salmond?

according to the reputation of the judge making then or according to their relation to the rest of the law upon the topic in question.

The legal profession exercises a powerful influence upon the development of law. The importance of legal profession in best exemplified in the Roman legal system. In Roman legal system the persons who administered justice were not skilled in law. They were mere citizens chosen at random to decide the disputed matter. The judges formed the specific issues and submitted them to the jurists for opinion. Though there was no obligation on the part of the Roman judge to follow his opinion nevertheless opinion of such jurists had a very powerful influence.

The third division of professional opinion comprises the opinion of the writers of text books. A supreme example of influence may be observed in the growth of international law. Owing to the peculiar structure of the science its rules have frequently depended to a great extent upon the opinions of justice. It should also be remembered that international law in its present form would have been impossible except for the labours and genius of Grothius. Generally speaking the influence of the writers of text books has been much greater in Roman law that in English law.

***b. Religion :*** Both Henry Maine and James Frazer agree that the religious fear of evil exposed by a priestly order is the principal instruments in securing uniformity of conduct in primitive society at a period when law cannot be said to enjoy any independent existence. Eventually out of certain ceremonial observance develop collection of secular rules enforced by physical sanctions. This process traced in an interesting fashion by Frazer in Folklore in the Old Testament. One phase of the progress of society centers around the separation of la and religion. The Jews regarded their laws as Divine origin and in consequence their administration was never freed from priestly control. In the east the laws of Manu. Hindu Law and Mohammedan Law are supposed to be divinely inspread. Due to Renaissance and Reformation the secular power of the kings were well established in Western Europe relegating the church and religion to subsidiary position, deprived of any independent binding source of law. However, in the East religion survives a binding source of law practically to the present time.

c) ***Principles of Morality or Equity :*** One every case which comes before him it is necessary for the judge to reach some definite conclusions although all the recognized sources of law are silent. In such a case the judge must decide issue according to its merits and in doing so he will usually be guided by the principles of morality, equity, fair dealing current in that community as reflected in his own intelligence. Even where a binding source exists his method of applying, it will be regulated to some extent by moral principles. In most communities such moral principles will have their origin some system of religion. The moral outlook of the community progresses as community itself progress. Thus the principles underlying a system of law require periodic revision if the law is to keep pace with the moral growth of the people. It is impossible to accomplish this revision by legislation alone. So the bulk of this work may be achieved by the views upon morality held by judges and which are applied by the deciding cases.

Rules of morality till recent times have been deduced from religion. However, for the Greeks religion was held to be in sufficient sources of moral rules, Greek philosopher therefore supplied the missing moral ideal by evolving the conception of law of nature base on reason. Law of nature indicated the object of human law, that it should attempt to confirm to an ideas standard deducible from the dictates of confirm to an ideal standard deducible from the dictates of Nature through the reasoning faculty with which the human species is endowed. The same conception also influenced the development of Roman law. The moral or equitable rule in Roman system of law was aimed at bringing that system in closer conformity with reason's perfect law. In the middle ages a fusion took place between religion and reason. The law of God is perfect therefore it is that ideal law which human reason elaborates. Therefore, those equitable principles which should modify human law are desirable equally from Divine ordinance of from reason. However, in modern times legal philosophy has freed itself from natural religious basis of morality.

The growth of a system of equity in Roman and English Law will be dealt with more in detail in ancient law. Suffice here to note that both the systems of equity were the result of rigidity of the respective common laws and

(Space for Hints)

equity was devised by the king to mitigate the hardships caused by the rigidity of law.

## 3.4. THE DECISION OF FOREIGN COURTS OF JUSTICE :

The countries of the Commonwealth have legal systems which are based on common law of England. So it is permissible for courts of the common law countries to seek guidance from the decisions of courts of other countries. But here the decision of foreign courts have persuasive force only and are not binding as such.

## 3.5. LEGAL OR FORMAL SOURCES

The legal source are those sources which are binding per see i.e. their authority is complete. Three sources of law are analysed under this heading

### 3.5.1. Custom

All creatures are creatures of habit. In the lower forms of life habitual behaviour, mysterious in origin and operations is called instinct. Only a fine line divides the instinctive behaviour of certain higher organisms and that of primitive man. At a certain stage of his development man while retaining some instinctive reactions comes to possess an increasing degree of choice in his habit and customs. The mere existence of a society, the mere plurality of individuals give rise to customs from which no single member of the totality can completely divorce himself. Our highly developed societies of modern world are just as replete with social customs as the primitive societies of the past. These custom are doubtless more rationalised and for the most part less superstitious than once they were but they are quite as numerous and quite as powerful. In varying degrees they all possess a sanction. To disregard them involves some kind of penalty.

> **Check Your Progress**
> 4. What are the formal sources of Law?

In all legal systems custom plays a very important role in the development of law. When a person has been doing a thing regularly over a substantial period of time it is usual to say that he has accustomed to it. This habit of his may concern anyone but himself or it may affect only those who are in the immediate circle. But when a large section of the people are in the habit of doing a thing

over much longer period it may become necessary for the courts to tame notice of it.

(Space for Hints)

The beginnings of law lies in custom according to Maine. In the 19th century anthropologists who studied primitive societies assumed that law and custom were two different conceptions. Law belonging to developed societies while custom belongs to primitive societies. In the primitive societies, custom was conceived to be very rigid, obedience being secured by group sentiment, fortified, by religions and magic. It was impossible to differentiate between religious rituals from legal rules.

Twentieth century field research by anthropologists among primitive societies gave a more profound understanding of the working of the customary rules within the society. Researches by scholars established that primitive people possessed a system of law in a genuine sense. Amongst the scholars who made substantial contribution to the study of custom in primitive societies, mention could be made of the writing of Lowie, Malinowski, Hoebel, Gluckman and Diamond.

### 3.5.2. Outstanding Features of Custom

The characteristic feature of great majority of custom is that they are essentially non-litigious in origin. They arise not from any conflict of rights adjusted by a supreme arbiter but from practices prompted by the convenience of society and of the individual. So the starting point of all customs is convention rather than conflict, just as the starting point of all society is cooperation rather than dissension.

Custom is the embodiment of these principles which have commanded themselves to the national consciousness, justice and public utility. Existence of an established usage forms the basis of rational expectation of its continuance in the future. To the historical jurists custom carried its own justification, because it would not exist at all unless some deep seated need of the people or some native quality of temperament gave rise to it. To these jurists all law is essentially the product of natural forces associated with the spirit of each particular people and nothing is more representative of these evolutionary processes than the customs which are found to exist in each community and

**Check Your Progress**

5. What are the features of custom.

(Space for Hints)

which are as indigenous as its flora and fauna. Custom is the badge and not a ground of origin of positive law. Pchta, Savigny's disciple carried this principle still further. The him, custom, was not only self sufficient and independent of legislative authority but was a condition prudent of all sound legislation. He found the basis of customary law in the collective purposes of the nation and express legislation could be useful only in as far as it embodied this purpose as already manifested in custom. The starting point according to all historical jurists is the Volkageist which exists defect and which must be accepted without any attempt to explain it as a rational phenomenon. It is primarily a sociological not a legal fact. Law is but one among many of its manifestations. But custom comes early among the sefestations and is reflection of the convictions of the people. In itself it crestes noting. It is not the hammer. It is the spark stuck from the anvil. Its effect is to make known the existing spirit of the people. All law whether applied by judges or made by legislators must accord with this native Volkageist.

A closer scrutiny of these opinions of the historical jurists will reveal that many customs which have taken deep foot in the society do not appear to be based on any general conviction of their righteousness or necessity or upon any real and voluntary consensus. Slavery was almost the universal practice of the ancient world. It was not accepted without such criticism from those who concerned themselves with its moral also opposed to its merely utilitarian aspects. The truth is that slavery was a custom based not upon the needs of popular majority but of a ruling minority. Thus customs establish themselves not because they correspond with and conscious, widespread necessity but because they fit the economic convenience of the most powerful caste. Moreover, many customs are so essentially local in origin they cannot be said to arise from any widespread conviction.

Customs may in a greater or lesser degree, be rational in their inception, but it often happens that once they have been inaugurated elements of non-rational character enter in. Thus customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared. It is a very characteristic quality of custom that the mere fact of this practice and repetition invest it with a sanctity which is often more compelling than reason, logic or utility. To find out the reason it is necessary to deal with the

part played by sheer limitation in social customs. Imitation is one of the commonest and most influential elements in the life of every individual and every society.

The most systematic attempt which has been made so far to examine the working of the imitative faculty in the man and society is Tarde's Laws of imitation's. According to Tarde imitation is no mere curiosity of psychology, but one of the primary laws of nature. Nature perpetuates itself by repetition, and the three fundamental forms of repetition are rhythm or undulation generation and imitation. Applying them to the evolution of human societies Tarde sees imitation as one of the necessary inherent principles by which society perpetuates itself. It is no mere casual phenomenon recurring with unaccountable frequency ; it is wholly indispensable quality in the continuity of a society. Custom by its imitative influence is forever striving to maintain the copies of the same model and thereby acts as a great stabilizing factor in the society. Many of the influences which contribute to the force of imitation are extra logical and are not concerned with reason but with feeling and instinct. So custom as a legal and social phenomenon grows up by forces inherent in the society forces partly of reason and necessity and partly of suggestion and imitation.

### 3.5.3. Classification of Custom

Legal custom and conventional custom : A legal custom is one whose legal authority is absolute one which is itself and (proprio vigore) possess the force of law. The second consists of custom which operatives only indirectly and through the medium of agreements whereby it is accepted and adopted in individual instances as conventional law between the parties. The authority of conventional custom is conditional on its acceptance and incorporation in agreements between the parties to be bound by it.

Legal custom can be divided into two types. Local custom and general custom. Local custom prevails and has the force of law in a particular locality only whereas general custom has the force of law throughout the country. In the language of the English law the term custom is more commonly confined to legal custom exclusively while conventional custom is distinguished as usage.

(Space for Hints)

### 3.5.4. Application of custom

The scope of custom diminished as the formulation of the legal rules becomes more explicit and as a more elaborate machinery is step up for the making and administration of law. Ancient customs, however are still integral part of law of the land and the courts frequently have to deal with them.

The primary function of modern judicial analysis is to examine the nature and reality of existing custom not to invent new customs or arbitrarily to abolish those which are proved to exist in immemorial practice. Custom is self contained, self sufficient self justified law and if a custom proved in a court by satisfactory evidence to exist and to be observed the function of the court is merely to declare the custom operative law. In other words the custom does not derive its inherent validity from the authority of the court and then sanction of the court is declaratory rather than constitutive. But in order to merit recognition the custom has to satisfy certain tests all of which tend in one direction-proof of the actual existence and operation of custom.

### 3.5.5. Judicial tests of valid custom

In order that a custom or practice may be valid and operative as a source of law it must conform to certain requirements laid down by law. The views of Blackstone on this topic is accepted by all jurists and let us consider his views.

#### 1. Antiquity

The custom must have existed from time immemorial. It must have existed for such a long time that in the language of the law the memory of man runneth not to the conrary. But antiquity is a relative term and if in were applied as a test without qualification every custom would necessitate indefinite are chaeological research. So English Law set an arbitrary limit to legal memory fixing it at 1181 A.D. However, in India there is no such time limit. What is required is that is must be of ancient origin. The onus of antiquity is upon the person who sets upon the custom.

**Check Your Progress**

6. What are the valid test available to find valid custom?

**2. Continuance**

Blackston'e next rule is that of continuance. It must have been practiced continuously. Interruption with in legal memory defeats the customs. He draws a necessary in distinction between interruption of the right and the mere possession of the thing over which the right is asserted. The discontinuance of the right even for a day shall put the custom to an end but where there is mere disturbance of possession and of a claim to enjoy the custom its validity is not affected.

**3. Peaceable enjoyment**

The next rule is that the custom must have been enjoyed peaceably and the right claimed must have been exercised neither by stealth nor by revocable licence. It is sufficiently obvious that a custom which has only been wrested from the public by the strong hand is not a custom at all. As customs owe their origin to common consent their existence being immemorially disputed is a proof that such consent is wanting. A secret legal custom clearly cannot have any real existence.

**4. Opined necessitates**

Custom must be supported by the opinion necessities. The public which is affected by the usage must regard it as obligatory not merely as facultative. It refers to the conviction on the part of the persons bound to regard this as binding and not merely optional.

**5. Certainty**

The custom must be certain. This is purely a rule of evidence. The court must be satisfied by clear proof that custom exists as a matter of fact or legal presumption of fact. Alleged custom should not be indefinite or uncertain.

**6. Consistency**

Customs must be consistent with each other. One custom cannot be set up in opposition to another custom.

(Space for Hints)

### 7. Reasonableness

A custom must be reasonable. The authority or usage is not absolute but conditional on a certain measure of conformity with justice and public utility. It is not meant by this that the courts are at liberty to disregard a custom whenever they are not satisfied as to its absolute rectitude and wisdom or whenever they think that a better rule can be formulated in the exercise of their own judgment. The true rule is that a custom in order to be deprived of legal efficiency must be so obviously and seriously, repugnant to right and reason that to enforce it, as law would do more mischief than that would result from the overturning of the expectations of any arrangements based on its presumed continuance and legal validity. So the rule can be stated as follows : a custom will be admitted unless it is unreasonable.

### 8. Conformity with statute law

A custom must not be contrary to statute law i.e. Act of legislatures, since no custom or prescription can take away the force of an Act of legislature. By no length of can statute become absolute and inoperative in law and by no length of country usage can its provisions be modified in the smallest particular.

### 9. Should not be immoral

Custom should not be opposed to decency or morality.

### 10. Public Policy

Custom should not be opposed to public policy.

## 3.6. JUDICIAL PRECEDENT

In the broadest sense a precedent is any pattern upon which future conduct may be based. It is a device which is in constant use and widely employed in law. The broad meaning of the precedent in the sense of past decisions which are used as guides in the moulding of future decisions is in no way peculiar to common law systems for it is found in all the developed systems of law. The peculiarity of the law lies in the special mode in which it employs this device with precedents in certain circumstances have the quality of being laws in themselves and are also binding on the inferior courts which means that

**Check Your Progress**

7. What is meant by Judicial Precedent?

(Space for Hints)

they have to be followed or distinguished. A convenient nomenclature for this common law doctrine is *start decisis et non quieta mover.*

The doctrine of precedent is based upon the moral principle of justice. If people are required to settle disputes by peaceful process rather than by resorting to self help such process should not dispense with what they feel as justice in a situation complained of being unjust. In order to do this it is essential to foster confidence in its impartiality and in the judges who administer it ; and this has given rise to the fundamental principle that like cases should be treated alike. Since judgements are pronounced on facts of individual cases and like cases should be treated alike to reduce arbitrariness and caprice it becomes necessary to use previous cases as paradigms which furnish broad type situations. Thus the principle of justice inevitably gives rise to precedents wherever regular judicial process is established.

In the absence of a code in England the judges had to rely upon individual decisions a achieve consistency and to systematise the law they devised the doctrine of stare decisis to give direction to legal growth. However, before this doctrine could operate with full force two other conditions had to be fulfilled viz. a well established hierarchy of courts and reliable system of law reports. Both these conditions were fulfilled in England by the end of the 16th century when the doctrine was operating with full force.

### 3.6.1. Classification of precedents

Declaratory and original precedents . Declaratory precedents are those which affirm an already existing rule without creating anything new, whereas an original precedent is one which created for the first time a new rule or a principle.

Authoritative and persuasive, An authoritative precedent is one which judges must follow whether they approve of its or not. A persuasive precedent is one which the judges are under no obligation to follow, but such they will take into consideration and to which they attach such weight as it seems to them to deserve.

**Check Your Progress**

8. What is meant by declaratory precedent?

Authoritative precedents are further divided into conditionally authoritative and absolutely authoritative. Absolutely authoritative precedent is

(Space for Hints)

one which is absolutely binding and so has to be followed by the court before which it is cited even though it is erroneous. A conditionally authoritative precedent is one which is binding in all ordinary cases but in one special case its authority may be lawfully denied. It may be overruled or dissented from when it is not merely wrong but so clearly and seriously wrong that its reversal is demanded in the interests of sound administration of justice. Otherwise it must be followed even though the court which follows it, is persuaded that it is erroneous or unreasonable.

Where a precedent is disregarded it may take two forms. The Court to which it is cited may either overrule it or merely refuse to follow it. Overruling is an act of superior jurisdiction. A precedent overruled is formally deprived of all authority. It becomes null and void like a repealed statute and a new principle is authoritatively substituted for the old. A refusal to follow a precedent on the other hand is an act of coordinate, not of superior jurisdiction. Two courts of equal authority have no power to overrule each other's decisions. Where a precedent is not followed the result is not that the later authority is substituted for the earlier but that the two stand side by side conflicting with each other. The legal antinomy thus produced must be solved by the act of a higher authority. In the meantime the state of law remains uncertain.

### 3.6.2. Operation of the Doctrine of precedent in India

This common law doctrine was introduced into India by the English judges when they were appointed as judges of the High Courts established at the presidency towns of Madras, Bombay and Calcutta under the High Court Act of 1861. These English judges who were barristers by their training borrowed the English legal techniques wherever feasible to supplement the Indian law. Naturally they borrowed this doctrine of stare decisis along with other doctrines. Ultimately this doctrine was granted official recognition through section 212 of the Government of India Act of 1935. Later Article 141 of the Indian Constitution reiterated this view. The following is the overall position with respect to operation of the doctrine of precedent in India.

1. The law declared by the supreme Court shall be binding on all the court within the territory of India.

(Space for Hints)

2. The Supreme Court itself is not bound by its own decisions.

3. The Supreme Court itself is not bound by the decision of Privy Council or Federal Court.

4. Even a majority decision of the supreme Court can be reconsidered when a proper occasion comes before the Court.

5. In practice the unanimous opinions of the Supreme Court enjoys better authority than majority decisions.

6. The High Courts are bound by the decisions of the Supreme Court.

7. The High Courts are still bound by decisions of the Federal Court of Privy Council unless reversed or overruled by the Supreme Court of India or by appropriate legislature.

8. Decisions of High Courts are binding all inferior courts within the state.

9. Since High Courts are of co-ordinate jurisdiction one High Court cannot bind another High Court. Their decisions have persuasive force only.

Circumstances destroying or weakening the binding force of a judicial precedent

We have seen that a precedent that is overruled is deprived of all authority. We shall consider the various ways in which a precedent may lose all or much of its binding force.

**3.6.3. Abrogated decisions :**

a) A decision may lose its effectiveness if a statute inconsistent with it is enacted subsequently. This is legislative abrogation. Statutory abrogation of precedent may be express or implied. Examples of legislative abrogation.

Dwarakdas Srinivasa Vs. Sholpur Spinning and Weaving Co. State of West Bengal Vs. Subodh Gopal.

**Check Your Progress**

9. Explain Abrogated decisions.

(Space for Hints)

Both these cases have been abrogated by Constitution Fourth Amendment Act of 1955.

Golaknath Vs. State of Punjab abrogated by 24th amendment Act of the Constitution in 1971.

R.C. Copper Vs. Union of India was abrogated by 25th amendment Act of the Constitution.

b) A decision may also lose its effectiveness when it is reversed or overruled by a higher court. Reversal occurs when the same decision is taken on appeal and is reversed by the appellate court. Overruling occurs when the higher court declares in another case that the precedent case was wrongly decided and so it must not be followed.

Since overruling is an act of superior authority a case is not overruled merely because there exists some later opposing precedent of the same court or a court of coordinate jurisdiction. In such circumstances a court is free to follow either precedent whereas when a case is overruled in the full sense of the word the courts become bound by the overruling case not merely to disregard the overruled case but to decide the law in the opposite way.

### 3.6.4. Reversal on different ground

Very often it happens that a decision is reversed or affirmed on appeal on different grounds. According to Jessel M.R. where judgment of the lower court is affirmed or reversed on different grounds by the appellate court by giving the reasons that it does not agree with the grounds given below it is then deprived of all authority. In other words, the higher court relieved itself of the disagreeable necessity of overruling the court below by finding another ground on which judgment of the lower court can be supported.

The true view according to Salmond is that a decision either affirmed or reversed on another point is deprived of any absolute binding force it might otherwise have had. But it remains an authority which may be followed by a court that thinks the particular point to have been rightly decided.

### 3.6.5. Ignorance of a statute

A precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of a statute. This rule was laid down by Lord Haisbury in the leading House of Lords case London Street Tramways Vs. London Country Council. This rule also applies even though the earlier court knew of the statute in question if it did not refer to and had not present to its mind the precise terms of the statute. Similarly a court may know of the existence of a stature and yet not appreciate its relevance to the matter in hand.

### 3.6.6. Inconsistency with earlier decisions of higher courts

It is clear law that a precedent loses its binding force if the court that decided it overlooked an inconsistent decision of a higher court.

### 3.6.7. Inconsistency between earlier decisions of same rank

A court is not bound by its own previous decisions if they are in conflict with each other. This might happen when conflicting decisions may start from a time before the binding authority of the precedent was acknowledged. Secondly the conflict may have come through inadvertence as the earlier decision was omitted from being cited in the later. Owing to the vast number of precedents and the heterogeneous way in which they are reported it is easy to miss the relevant authority. Whenever a relevant prior decision is not cited before the court or mentioned in the judgement it must be assumed that the court has acted in ignorance of it. If the new decision is in conflict with the old it is given perincuriam and is not binding on a later court.

Although the later court is not bound by the decision so given per incuriam, this does not mean that it is bound by the first case. Perhaps in strict logic the first case should be binding since it should have never been departed from and was only departed from per incuriam. However this is not the rule. The rule is that where there are previous inconsistent decisions of its own the court is free to follow either. It can follow the earlier but equally if it thinks fit it can follow the later.

(Space for Hints)

### 3.6.8. Precedents sub silentio or not fully argued

This is a more subtle attack upon the authority of the precedent. When a particular point of law involved in a decision has gone unnoticed and unargued by the counsel, the court may decide in favour of one party, but if all the points have been put forth the decision might have gone in favour of the other party. In such conditions though the case has a specific result the decision is not an authority on the point. The point is said to pass sub silentio. The particular point of law involved in the decision is not perceived by the court or present to its mind.

A good illustration is Gerand Vs. Worth of Paris Ltd. In this case a discharged employee of a company who had obtained damage against the company for wrongful dismissal applied for a garnishee order on a bank account standing in the name of the liquidator of the company. The only point argued was on the question of the priority of the claimants debt. and on this argument the court granted the decree. No consideration was given to the question whether a garnishee order could properly be made on an account standing in the name of the liquidator. When therefore this very point was argued in a subsequent case before the appellate court, the court held it was not bound by its previous decision.

We must now turn to the wider question whether a precedent is deprived of its authoritative force by the fact that it was not argued or not fully argued by the losing party. One of the chief reasons for the doctrine of precedent is that a matter that has once been fully argued and decided should not be allowed to be reopened. Where a judgment is given without all the factors not being fully discussed or argued before the court the decision cannot be regarded as possessing absolute authority.

## 3.7. RATIO DECIDENDI AND OBITER DICTA

What constitutes a decision in a case? What is that which actually binding on later court? In the course of the judgment the judge may remark or make observations which are not precisely relevant to the issue before him. He may illustrate his general reasoning by reference to hypothetical cases. Here the issue

(Space for Hints)

is not the one which arises between the parties. Full argument will not be possible and it will be unwise to accord to the actual decision. These observations by way of obiter dicta are without any binding authority.

Ratio decidendi as opposed to obiter dicta is the rule acted upon by the courts in the case. It simply means reasons for the decision of the case. It is binding principle of the case. It is the role of law applied by and acted by the court or the rule which the court regards as governing the case.

Common law requires that courts should explain and justify their decisions. So normally we can find the rule which is applied stated in the judgment of the court. Later courts how ever, are not content to be completely fettered by the predecessors. When a court first states a rule it cannot have before it all possible situations to which the rule as sated may cover and there may be situations to which it would be quite undesirable that it should apply. If such a situation should come before a later court that court might well take the view that the original rules has been too widely stated and must be restricted in application. Or again the original court where stating the rule is neither concerned nor obliged to formulate all possible exceptions to it. Such exceptions must be dealt with as and when they arise by later courts. This freedom on the part of the later court to distinguish previous decisions makes the operation of precedent more flexible and it has given rise to the view that ratio decidenti of a case is in fact what later cases consider it to be because it is always possible that a later court may hold that the rule started and acted on by the judge in a case is wider than necessary for the decision.

### 3.7.1. How to locate the Ratio Decidendi?

While it is fairly simple to describe what is meant by the term ratio decidendi, it is far less easy to explain how to determine the ratio of any particular case. Though we know it is the rule acted upon by the judge we cannot always tell for certain what that rule was. In others we are furnished with lengthy judgments in which may be embedded several different propositions all of which support the decision. Another difficulty is that any general rule of law must relate to a whole class of facts similar to those involved in the case itself, but what this class is will depend on how widely are abstract the facts in question.

**Check Your Progress**

10. What is meant by Obiterdicta?

(Space for Hints)

Various methods of determining the ratio have been advanced. Wambaugh's Reversal Test : The reversal test of Prof. Wambaugh suggested that we should take the proposition of law put forward by the judge reverse it or negate it and then see if its reversal or negation would have altered the actual decision. If so, then the proposition is the ratio or part of it if the reversal would have made no difference it is not. In other words the ratio is a general rule without which the case would have been decided otherwise.

The Reversal test will not help us in cases where no proposition of law is given and where all that is contained in the reports is a statement of the facts together with the order that is made. Nor it is very helpful where a court gives several reasons for its decision. In such cases we could reverse each decision separately and yet the decision would remain unlatered since it could rest on other grounds. Quite often where a case is argued upon several grounds the judge will decide it on one of these grounds, and merely indicate his views on the remaining points so that his first proposition of law alone will constitute the ratio.

### 3.7.2. Dr. Goodhart's Material Facts Test :

The better way to approach the problem is to elucidate the ratio of the case from the facts themselves rather than the principle enunciated by the court. The ratio can be determined by ascertaining the facts treated as material b the judge together with his decision on these facts. This test directs us away from what judges say towards what in fact they do and it is indeed the only way of diving a ratio in cases where no judgement is given. Where a judgement is given it is from this we must discover which facts the judge deemed material and which is not. The material facts test requires us first to determine the facts of the case as seen by the judge and then to discover which of these facts he has found to be material for his judgement. The principle of the case is found in the conclusion, reached by judge on the basis of material facts to the exclusion of immaterial ones. Having established the principle of the case and excluded all dicta the final step is to determine whether or not it is a binding precedent for the succeeding case.

**Check Your Progress**

11. Explain Good-heart Material Facts Test?

The material facts test is valuable in stressing that proposition of law are only authoritative in so far as they are relevant to the facts in issue in a case; a

judicial statement of a law therefore must be read in the light of the facts of the case.

*The Rule of the Judges in the Judicial Process whether they make law or declare existing law?*

The process of judicial decision may be regarded as either deductive or inductive and the function of the judge will differ widely according as one or the other of the two views is adopted.

The first theory associated principally with the codified systems assumes that a legal rule applicable to any particular case is fixed and certain from the beginning and all that is required of the judge is to apply this rule as justice according to law demands without reference to his own personal view. His decision is deduced directly from general to particular from the general rule to the particular circumstances before him.

The second theory characteristic of English law starts with the same primary object of finding the general rule applicable to the particular case' but its method is wholly different. It does not conceive the rule as being applicable directly by simple deduction. It works forward from the particular to the general. The judge has to reason inductively and in that process he said to be bound by decisions of tribunals, higher than his own.

***The Declaratory Theory or The Mechanical Jurisprudence:-*** The theory was propounded as early in 1713 by Sir Mathew Hale who said that the decisions of courts of justice do not make law property so called for that only the king and parliament can do Blackstone formally enunciated this theory "the judges" Blackstone. said are the depositories of law' the living oracle, who must decide in all cases of doubt and who are bound by an oath to decide according to the law of the land". This theory assumes that laws already in existence and a court while deciding a case merely discovers it and declares it .

The declaratory theory is the product of the following factors.

a) It is based on the false assumptions that there must be some rule which is always waiting to be discovered and to be applied.

(Space for Hints)

b) This doctrine is founded on assumption of Natural law of which common law is a part.

c) It is an offshoot of the doctrine of separation of powers which maintains that the legislative, judicial and executive organs of government should be kept separate, each confined to its own allotted filed. This calls upon the judiciary to exercise judicial self-restrain because making law is the proper function of the courts.

d) Since judicial decisions pronounce upon the validity or legality of the issue after the conduct has taken place it is not a sound principle of justice to make law with retrospective effect.

e) The syllogistic form of reasoning which implied that premises from which conclusion is reached is already in existence.

The declaratory theory of Blackstone denied any creative function on the part of the judges. All that the judge has to do when a dispute comes before his is to find out the relevant rule applicable to the facts of the dispute and the decision will be automatically supplied by the rule. The judge performed merely a mechanical function. This is expressed in the mathematical formula Rule + Fact = Decision.

This view is opposed by jurists like Polloack and Dicey. According to Pollock no intelligent lawyer would pretent that decisions of courts do not make new law. Judge made law is real law. According to Dicey nine tenths of the English law of contracts and almost all the law of torts are made by the judges in England. So Blackstonian theory is not acceptable.

Diametrically opposed to the Blackstonian theory is the school which is known as the Free Law Finding School. The exponents of this school which is of continental in origin maintain judges alone are real law makers and they should be given absolute power to make law they pleased.

According to *Ehrlich* there should be free law finding in all cases except in cases where law is clear and need not be found. *Stampe* demands a judicial right to alter the law where law has produced what he calls a general calamity. *Herman* Isay maintains that finding of law is an intuitive process directed

by certain sentiments and prejudices while logical argument is substituted as after thought. *Geroge Cohen* rejective traditional jurisprudences of norms and concepts demands that law should be found in the individual case without any ties of norms and rules. The view of this Free laws finds expression in the Article I of the Swiss Civil Code of 1907.

"The statute governs all matters within the letter or the spirit of any of its madates. In default of an applicable statute the judge is to pronounce judgement according to customary law and in default according to the rules which h would establish if he were to assume the post of the legislator.

Somewhat from a different stand point the American Realists supported the view of this school. The American realist movement maintained that the judges had a great deal of freedom to make law. This was possible when the judges had to assess the facts of the dispute and accommodate them under the relevant rules. Moreover the concept of *ratio decidendi* itself is a fluid concept with no fixed means of ascertaining it. Through these leeways of choice the judges give free play for their emotions, sentiments, prejudices, etc., which ultimately influenced the decision. In short, the judges decided first and reasoned later. In the words of Gray, Judges alone are the makers of law since whoever has absolute authority not only to interpret the law but to say what the law is truly the law giver.

We have seen the two conflicting theories on he role of the judges in the judicial process, one contending that judges do not and should no make law (supported by Mathew Hale Blackstone. Austin and Bentham) and the other contending that judges alone are makers of all law (supported by Free Finding movement and the American Realism). He truth appears to lie somewhere in between.

There are numerous instances where a judge may have to lay down a rule for the first time without any assistance from any statute or a previous precedent. They judge in such circumstance may not have any guidance as to how to decide the dispute. He has to invent a new rule to met the new situation. Under such circumstances he is definitely making law but only within the limits, well defined.

(Space for Hints)

Compare now the function of the judge with that of the legislature in making law. The legislature unlike the court is not confined to the past or the present but it can also deal with the futuestiations. The legislature can manufacturer entirely a new material where as the court is confined to the facts of the dispute before it. Thus judges make law only in the derivative for secondary sence. It is not an original act of creation. Every at of interpretation shapes something new in a secondary sence. The creative power of the courts is limited by existing material as their common. They find the material and shape is whereas the legislature as we saw already can manufacture entirely new material.

***Conclusion :*** Judges do make law. A scrutiny of the judicial process of the many countries shows that the Blackstonian theory is unacceptable. The courts cannot manufacture entirely new material, but it can fashion or shape the exiting material manufactured by the legislature. As *Cardoza* pointed out judges do not enjoy untrammelled power of laying down abstract principles of law but they are influenced by their knowledge which is gained by experience, study and reflection in other words from the reading of the life itself. Perhaps the correct position was put forward by Justice Holmes according to whom the judges legislate only interstitially i.e., within the gaps of the legal system. He can intervenes only to supplement the formal authorities and even in that sphere his discretion is limited.

Judges have enormous freedom in handling the precedents. The difficulty of locating the *ratio deciding* of a case enables the judges to make law if necessary.

### 3.7.3. Doctrine of Prospective overruling

Judicial precedents are retrospectively in operative. In other words courts pronounce upon the validity of acts or events or transactions after they have taken place. This is in one sense opposed to principles of natural justice which requires that law should be made known before it can be applied to particular types of situations or transactions. To get over this difficulty the American courts have devised a new technique known as the doctrine of prospective overruling i.e the overruling of a well established precedent limited to future situations and excluding application to situations which have arisen before the decisions and are

**Check Your Progress**

12. Explain the doctrine of prospective over ruling.

(Space for Hints)

therefore presumed to be governed by reliance on the overruled principles. This principle was fits propounded by Justice Cardozo in Great Northern Railway Vs. Sunburst. Oil and Fefining co. Later this doctrine was reiterated by the *U.S. Supreme Court in Linkletter Vs. Walker.* This doctrine was borrowed by the India supreme court in the famous case *Golaknath Vs. Stte of Punaja A.I.R. 1965 S.C.*

## 3.8 LEGISLATION

The term legislation according to Salmond has three different meaning. First it is used to refer to all methods of law making. To legislate is to make law in any fashion. In this sense any act done with the effect of adding to or altering the law is an act of legislative authority. As so used legislation includes all the sources of law. Thus when judges establish a new principle by means of a judicial decision they may said to exercise legislative and not merely judicial power. Second, in the strict sence legislation is the laying down of legal rule of by a sovereign or subordinate legislator. Thirdly legislation includes every expression of the will of the legislature whether directed to the making of rules or not. In this sense every At of Parliament is instance of legislation irrespective or its purpose and effect.

Legislation is of two types. It is either supreme of subordinate. Supreme legislation is that which proceeds from the supreme or sovereign power in the state and which therefore is incapable of being repealed annulled or controlled by any other legislative authority. Subordinate legislation is that which proceeds from any authority other than the sovereign power and is, therefore, dependent for is continued existence and validity one some superior or supreme authority. In other words, the sovereign legislator is that which has no rival in the state.

### 3.8.1. Subordinate Legislation:

Enactment of legislative bodies inferior to the sovereign constitutes subordinate legislation. Such legislation is subordinate in that it can be repealed by and must give way to sovereign legislation. In many cases, it is of derivative in nature, the power to legislate having been delegated by the sovereign to the subordinate.

(Space for Hints)

**The chief forms of subordinate legislation are five in number.**

1) ***Colonial:-*** The power of self government entrusted to the colonies and other dependencies of the ruling state are subject to the control of the legislature of the ruling state, which can repeal, annual or modify any colocial enactment.

2) ***Executive:-*** The essential function of the executive is to conduct the administrative department of the state, but it combines with this certain subordinate legislative powers which have been expressly delegated to it by the legislatures. This has given is under modern conditions to what is called as the delegated legislation. Delegated legislation depends for its validity upon the parent statute.

3) ***Judicial :-*** Similar to delegated legislation, certain deleged legislative powers are possessed by the Judiciary. The superior courts have the powers of making rules for the regulation of their own procedure.

4) ***Municipal:-*** Municipal authorities re entrusted by the law with limited and subordinate powers of establishing social law for the districts under the control. The enactment so authorised are termed as by-laws and this form of legislation may be distinguished as municipal

5) ***Autonomous:-*** The great bulk of enacted law is promulgated by the state. But in exceptional cases, it has been found possible and expedient to entrust this power to the private hands. The law gives to certain groups of private individuals limited legislative authority touching matters concerning them selves. A railway company is empowered to make by laws for the regulation of its undertaking. A University may make statues binding upon its members. A registered company may after those articles of association be which its constitution and management are determined Legislation thus effected by private persons and the law so created may be distinguished as autonomic.

**Check Your Progress**

13. What are the chief forms of subordinate legislation?

## Merits of Legislation over Judicial precedent

So great is the superiority of legislation over all other methods of legal evolution, that the tendency of advancing civilization is to acknowledge its exclusive claim and to discard the other instrument as relics of the infancy of law. In considering the advantage of legislation it will be convenient to contrast it especially with its most formidable rival namely precedent.

1) The first virtue of legislation lies in its abrogative power. It is no merely a source of new law but is equally effective in abolishing that which already exists. But precedent possesses merely constitutive efficacy: it is capable of producing very good law-better *in some respects than that which we obtain* by way of legislation but its defect is that in a strict system of binding precedent its operation is irreversible. Since legislation possesses constitutive and abrogative efficacy it is an indispensable instrument of law reform.

2) The second respect in which legislation is superior to precedent is that it allows an advantageous decision of labour which results in increased efficiency. The legislature becomes differentiated in increased efficiency. The legislature becomes differentiated from the judiciary, the duty of the former being to make law while that of the latter is to interpret and apply it. A legal system will be best administered when those who administer it have this as their sole function. Precedent on the other hand unites in same hand the business of making the law and that of enforcing it.

3) The third advantage of statute law is that the formal declaration of it before the commission of the acts to which it applies is condition precedent to its application in courts of justice. Case law on the contrary is created and declared in the very act of applying and enforcing it. Legislation satisfied the requirement of natural justice that laws shall be known before they are enforced. But case law applies retrospectively being created and applied to facts which are prior in date to the law itself. However is difficulty can

(Space for Hints)

be remedied by resorting to what is called as the doctrine of "*Prospective Overruling.*".

4) Legislation can be way of anticipation make rules for cases that have not yet arisen, whereas precedent must wain till actual concrete instance comes before the courts for decision. Legal development through judicial precedent depends upon the accidental course of litigation. A point of law must remain unsettled until by chance an appropriate case arises Legislation can fill up a vacancy or settle a doubt in the legal system as son as the existence of this defect is brought to the notice of the legislature. Precedent, therefore, is incomplete, uncertain and unsympathetic.

5) Legislation is greatly superior to case law in point of form. Legislation assumes the form of abstract propositions while precedent is merged in the concrete details of the actual cases. Statute law is brief, clear, easily accessible and knowable while case law is buried from sight and knowledge in the mass of reports.

These are the advantages of legislation over judicial precedent. Now let us see the merits and defects of judge made law i.e., judicial precedent.

**Merit**

1) Judge made law is the outcome of the practical need. Therefore, it is more flexible than legislation or custom. It is in living contact with reason and justice of the matter.

2) Judicial precedent is concrete because it is formulated to solve an actual problem. So it avoids broad generalizations.

3) Case law is the best preparation for statute law. Mercantile law is nothing but codified case law.

**Defects**

1) Possibility of overlooking essential decisions.

(Space for Hints)

2) Unlike legislatures which are answerable to the people the courts are not accountable to the people.

3) Courts are slow to respond to the social changes.

## Principles of Interpretation of Statutes

Interpretation is the process by which the courts seek to ascertain the meaning of the words used by the legislature. Every statute is made up of two parts; *Litera legis* the letter of and *Sententa legis* the intention of the legislature. The courts in applying a statute do not have absolute freedom to interparect it. They are guided by the intention of the legislature because the essence of law lies in the sprit if and not in the letter. Normally the courts will take the Ilitea lègis *as conclusive proof of the sententia legis* and will not go behind it.

Interpretation is of two kinds; grammatical or logical and Literal or functional.

***Grammatical Interpretation:-*** Also known as the literal interpretation, plain meaning rule etc. According to this rule if the words used are plain and unambiguous we are bound to construe them in the ordinary sense even though it leads to manifest injustice or absurdity. This plain meaning doctrine signifies that statutory language has a clear and obvious meaning and it is the duty of the court to give effect to that meaning even though it leads to a conclusion which canto be grounded on the policy of the statute. Words and phrases must be constituted according to ordinary rules of grammar and commissions must not be inferred. Every work in a statuette must be give a meaning. Logical or functional interpretation departs form the letter of law and·seeks elsewhere more satisfactory evidence of the true intent of the legislature.

***The Golden Rule :*** "We must adhere to the ordinary meaning of the words used and to the grammatical construction, unless that is at variance with the intention of the legislature to be collected for the statute itself or leads to manifest absurdity or injustice in which case the language can be modified or carried in order to avoid such inconvenience but no further". - Parke, J. in *Beeke Vs. Smith.*

**Check Your Progress**

14. Explain the rule in Heydon's case.

(Space for Hints)

### The mischief Rule or the Rule in the Heydon's case

A statute may have no meaning at all or different parts of the statute are so defective or repugnant no clue is available as to the intention of the legislature. Under such circumstance the courts can apply this rule. According to the judge must ask the following questions.

a) What was the state of law before the making of the Act?

b) What was the mischief and defeat for which law did not provide?

c) What remedy the Parliament has devised to cure the disease of the common wealth?

d) True reason for the remedy.

The function of the judge is to make such interpretation so as to suppress the mischief and advance the remedy.

***Beneficial construction:*** A statute which purports to confer a benefit on individuals or a class of persons by relieving them of a onerous obligation under contracts entered into by them or which tend to protect persons against oppressive acts from individual with whom they stand in certain relations is called beneficial legislation. In interpreting such a statute the principle established is that there is room for taking narrow view but that the Court is entitle to be generous towards persons on whom the benefit has been converged.

### 3.8.2.Subsidiary rules of Interpretation

a) *Noscitue a socis* .- Meaning of the words must be judged by the company it keeps. When two or more words which are susceptible of analogous meaning are coupled together they are supposed to be used in their cognate sense.

b) *Ejusden Gederis Rule:*- When general words follow more specific, the rule restricts the meaning of the general words to things or matters of same kind or genus.

c) *Expression units et exclusion alterins:* mention of one or more things of a particular calls may be regarded as silently excluding all other members of the same class.

d) *Expression fncit cessare tacitum.* What is expressed makes what is silent to case and puts an end to implication.

e) *Ultres magis valeat Quam pereat:* If the choice is between two interpretation one narrow which fails to achieve the object to the legislature and the other broad interpretation. Which achieves the legislature we should prefer the broader interpretation since the presumption is that the legislature would have legislated only to bring about an effective result.

f) *Casus Omiss :* Omission is a statute should not be inferred.

## 3.9. SUMMARY

Although the usual dictionary meaning of the word 'source' is 'Origin' or beginning yet the term source has been employed in more than one sense. In the sense it simply means whereby a knowledge of the law may be gained . Salmond uses the term source in a limited sense to mean the formal source of law. The next sense in which the term source is used that which provides the matter or content of the law. From this material of the law is eventually fashioned either through judicial activity (precedents) or legislative activity (codification). Custom, agreement, professional opinion or a rule of law under another system of law are called Historical sources of Law. From this idea jurists like Salmond, Keeton have classified the sources. The classification of sources and the theories related to this were clearly discussed in this lesson.

## 3.10. KEY WORDS

| | | |
|---|---|---|
| Ratio decidenti | - | Reasons for the decision of the case |
| Hierarchy | - | organization consist of several grades |
| Abrogation | - | Annulment of law |
| Mitigate | - | lessen or appease |

(Space for Hints)

## 3.11. ANSWER TO CYP QUESTIONS

For Question No. 1 - Refer section 3.1

For Question No. 2 - Refer section 3.1

For Question No. 3 - Refer section 3.2

For Question No. 4 - Refer section 3.5

For Question No. 5 - Refer section 3.5.2

For Question No. 6 - Refer section 3.5.5

For Question No. 7 - Refer section 3.6

For Question No. 8 - Refer section 3.6.1

For Question No. 9 - Refer section 3.6.3

For Question No. 10 - Refer section 3.7.1

For Question No. 11 - Refer section 3.7.2

For Question No. 12 - Refer section 3.7.3

For Question No. 13 - Refer section 3.8

For Question No. 14 - Refer section 3.8.1

## 3.12. MODEL QUESTIONS

### A) Long Answer Questions

1. What are the different sources of law? Explain custom as a source of law?

2. What are the advantages of legislation over precedent?

3. Define Custom and explain different kinds of custom.

### B) Short Answer Questions

1. What are the merits and demerits of Judge made Law?

2. What are the different meanings of Legislation given by Salmond?

3. What is meant by 'Ratio Decidendi'?

# UNIT - 4

# LEGAL RIGHTS AND DUTIES

## INTRODUCTION

A man has to live in a society and so the state provides suitable conditions of social life. This is done by the creation of relationships between persons by controlling human conduct. This is usually done by the law, commanding people either to do certain things or forbear from, to facilitate operation or performance of these duties the law creates right. The conception of right is therefore one of the fundamental significance in legal theory. In this lesson we are going to study about right and duties.

## OBJECTIVES

- To know the various definition of Rights and duties
- To study the theories regarding rights and duties
- To understand the characteristics of Rights and Duties
- To analyse the kinds and classification of rights and duties

## UNIT STRUCTURE

4.1. Definition

4.2. Rights and duties are correlatives

4.3. Theory of absolute duties

4.4. Characteristics of legal rights

4.5. Classification of rights

4.5.1. Perfect and imperfect rights

4.5.2. Right in Rem and Right in Personam

4.5.3. Prcperiotory and personal right

(Space for Hints)

4.5.4. Positive and Negative right

4.5.5. Principal and Accessory right

4.5.6. Legal and Equitable right

4.5.7. Legal and Natural right

4.5.8. The legal nature of right against the state

4.6. Classification of Duties

4.7. Summary

4.8. Key Words

4.9. Answer to CYP Questions

4.9. Model questions

## 4.1. DEFINITION

**Salmond** defines a right as an interest recognized and protected by a rule of right. It is an interest, respect for which is a duty and the disregard of which is a wrong? A right is defined here in terms of a duty and a wrong. Let us analyse these terms so that we may understand better the relationship between right and duty.

**Rights:** Many a jurist is of the opinion that as the primary object of the state is to prevent positive harm, the state creates duties and it is to facilitate the operation of these duties that the state creates rights. But Holland and Jhering hold a contrary view. To them the immediate objects of the law are the creation and projection of legal rights and a duty is an act or forbearance commanded by the law to protect the interest of individuals.

**Check Your Progress**
1 Define Right?

**Jhering** defines a right as a legally protected interest. But this is not correct, because although a right can exist in respect of an interest, every legally protected interest does not give rise to legal right. Though an attack upon an interest may amount to a wrong it is not true to say that every attack upon an interest accounts to a wrong. Cruelty to an animal is not a wrong to the animal although its interest which is protected by the law is attacked. No legal wrong is

committed as there is no bond of legal obligation or vinculum juris between mankind and them, so none is broken. So whether an interest amounts to a right will depend whether there exists in respect of it a duty imposed on another or others, and whether the law can enforce the performance of it. Prof Gray is nearer the mark when he points out, the right is not interest, but the means whereby the interest is secured. The right is one of means to secure the enjoyment of the interest. To illustrate, I have a right or reputation. My right of reputation does not consist in the interest. I have in the good opinion you have of me. My right consists of a capacity or ability or power which the law gives me to exact a certain behaviour from you. You shall not defame another is a duty in the form of a command imposed on you by the law. The person with the right of reputation can prevent you from committing breach of this duty, because the law has given him the power to compel you to perform this duty. So where there is a legal right there is a duty which, with the help of the law can be enforced interest. It is an interest recognized by the law. Salmond points out that before a right can come into existence, the law should not only protect but should also recognize the interest. A beggar's interest is protected but not recognized by the law. So a beggar has no legal right and you owe no legal duty towards him to give alms. The person who has a legal right has right to control the person bound by the corresponding duty.

**Holland** defines a legal right as a capacity residing in one man for controlling with the assent and assistance of the state. the actions of other. He goes further and states that which gives validity to a legal right is in every case, the force which is lent to it by the state. Anything else may be the occasion, but is not the cause of its obligatory actor.

## 4.2. RIGHTS AND DUTIES ARE CORRELATIVES

To Salmond rights and duties are necessarily correlated. He states there can be no right without a corresponding duty, or duty without a corresponding right, any more there can be husband without a wife or father without a child. Every right or duty involves a vuculum juris or bond of legal obligation by which two or more persons are bound together. From this it is quite clear that where there is a right there necessarily is a duty: one cannot exist without the other.

(Space for Hints)

There can, therefore, be no duty unless there is some one to whom it is due; there can be no right unless there is some one from whom it is claimed and there can be no wrong unless there is some one who is wronged, that is to say whose right has been violated.

Austin does not agree with Salmond that rights and duties are necessarily correlated. To Austin there are certain duties which do not have corresponding rights. He divides duty corresponds to a right i.e., it is a duty to be fulfilled towards a determinate person or persons, but an absolute duty has no such right with which it correlates

**Wrong:** When the right of a person is violated or infringed by the act of another, a wrong is committed. The person whose right is violated is wronged. A wrong is simply a wrong act, an act contrary to a rule of right and justice. From the definition it is quite clear that a wrong is also a breach of duty. If I owe you a duty and I commit a breach of that duty is amounts to a wrong. A wrong against you amounts to a violation of a right vested in you. So rights and duties are correlatives. This means that I cannot wrong you unless I owe you a duty. I cannot owe you duty unless you have a corresponding right vested in you. which right you can exercise against me and expect a certain behaviour from me.

Wrongs or injuries are divisible for our purpose into two kinds being either moral or legal.

Every wrong is not a legal wrong. There is another class of wrong called moral wrongs. **Moral wrongs** are morally or naturally wrong being a violation of a rule of natural justice. A **legal wrong** is legally wrong being an act contrary to a rule of legal justice. It is the law which says they are wrong suggesting thereby, they may or may not be morally wrong and conversely a moral wrong may or may not be a legal wrong.

**Duties:** When the law says you shall not clear or you shall not kill or when you have entered into a contract you shall fulfill your part of the contract, the law is imposing duties or setting up patterns of conduct to which our behavior in society is to conform. A duty is an obligatory act and it consists of either an act or a forbearance. When there is a breach of a duty wrong is committed. Performance of a duty therefore is avoidance of a wrong. As the primary purpose

(Space for Hints)

of the state is to see that there is law member on others, the state sees that he on whom the duty is imposed performs it so that his conduct does not give rise to conflicts. So when the duty is disregarded he is punished for it. When the law recognize and act as a duty it commonly enforces the performance of it, or punishes the disregard of it.

## 4.3. THEORY OF ABSOLUTE DUTIES

Austin analyses these absolute duties into different kinds a) Self regarding duties not to commit suicide b) duties owed to persons indefinitely i.e., towards the public at large not to commit an act of misname b) duties not regarding persons i.e. towards god and animals not blaspheme or be cruel to animals owed to the sovereign.

Taking into consideration the first class of duties, there cannot be a duty which I owe to myself. Where the second class of duty is concerned the general duty which towards the community breaks up into a mass of duties towards each particular individual and these duties are correlative of the right inherent in each member of the community. The third type creates no difficulty, they are not, in fact legal duties at all. Man's relation to his God is a matter of religion and not of law. So far as duties towards animals are concerned, we have no legal duties towards them.

But on deeper consideration to these so called duties, as the law prohibits all these acts, the duties resolve themselves as duties to the state or sovereign. They all constitute a part of criminal law and have a bearing on the community. A breach of the one of these duties attracts the criminal law of the land and they are punished by the state in the name of the state.

So the theory may be simply stated as follows; Can there be duties in favour of the state or sovereign without corresponding rights? Austin's argument is that these duties are duties towards the state and can have no corresponding right in the state. His first argument is that these three parties are necessary before the right can come into existence. A party on whom the right is vested, a party on whom is imposed the corresponding duty and a sovereign to confer the right and impose the corresponding duty. He argues, from this it is clear that a man

**Check Your Progress**

2. Explain the theory of Absolute Duties.

(Space for Hints)

cannot confer a right upon himself. Only a superior can create and confer rights upon inferiors. That being so if you concede that a sovereign can have rights you must go a step further and say that in every community there must be a super sovereign also to create and confer rights on a sovereign but in every society there is only one sovereign. So a sovereign, can have no rights. The same argument he extends to duties also. As duties cannot be self imposed, a sovereign cannot be bound by duties. So in all those cases where subjects owe duties to the sovereign or states there can be no corresponding rights in the state or sovereign. So these duties are absolute in character. And when the state or sovereign is not bound by duties, the subjects can have no rights against the state or sovereign.

The later jurists like Jethro Brown and Salmond do not agree with Austin's view. The fact that criminal justice is a prerogative of the state and through the state procedure the wrongdoers are punished. The wrong doer is punished by the state only in the exercise of its rights under criminal law.

The state has a right to impose taxes and a right to collect the taxes. In many of its dealings and activities there is no difference between the state and the citizen. Jethro Brown observes: If a sovereign having laid down law the contracts shall be enforced, enters into contracts with its own subjects, and if those contracts are enforced as a matter of fact by it courts even as against the sovereign, then it is impossible to deny that sovereign is under a legal duty towards its subjects: we cannot refuse to describe the sovereign liability as a legal duty on the ground that the sanction is self imposed, if as a matter of fact the sanction is invariably admitted by the sovereign and applied by the courts. This is also true of the branches of law, such as, the law of property and obligations. Thus it is quite clear that the state can have rights and be bound by duties as well. When the state lays down a law and recognizes certain rights and duties, they are legal right and legal duties not because the state is bound to recognize them, but because it does no.

Another argument of Austin is, that a legal right should be vested in a determinate person or persons who cane exact the corresponding duty. But where

absolute duties are concerned the corresponding right cannot vest in any determinate person or persons. So there can be no corresponding rights.

Salmond's reply to this argument can be given in his own words there is no reason to define a right in so exclusive a manner. All duties towards the public correspond to rights vested in the public end a public wrong is necessarily the violation of a public right. How true this is, consider anyone of the so called absolute duties a breach of them violates a right vested in each individual member of the community, who can take action against the violator. A person who attempt to commit suicide, or one who blasphemes God or is cruel to an animal or commits an act of nuisance is violating a public right vested in men as a member of the public and I shall be perfectly within my rights to haul him to the police station or launch criminal proceedings against him for the breach of such a duty.

## 4.4. CHARACTERISTICS OF LEGAL RIGHT

The terms right-duty covers several legal relations, each with its distinct characteristics. For the moment it is sufficient to emphasize the elements in a legal right. Paton and Keeton are of the view that there are only four elements in a right, but Salmond adds one more, viz, title as an element of a right. To Holland a title is only a source of a right and so not a characteristic.

Every right involves the following characteristics: 1. It is vested in person. He is called the owner of the right, the person entitled or the person of inheritance 2. It is available against person who is bound by the correlative duty. This is the person bound or this person of incidence. 3. The person so bound, has to act or forbear in favour of the person of inheritance. This act or forbearance is the content of this right. 4. The act or forbearance relates to something which is designated the object or subjects matter of the right 5. Every right has title. A title is the set of facts or events by virtue of which the right becomes vested in its owner. Whether a right is inborn or acquired a title is equally requisite. Without a title there can be no right as is the sources of a right.

**Check Your Progress**

3. What are the characteristic s of a legal right?

Many a jurist is of the view that the object or subject matter of a right should be something material. There can be no legal right, where the subject

(Space for Hints) matter is something immaterial. Salmond has rightly pointed out that what is essential is, the interest whether it is in respect of a material thing or immaterial thing must have obtained recognition and protection as a right from the law.

In support Salmond enumerates five different kinds of legal rights in everyone of which object or subject matter of the right is something immaterial and the interest has received legal recognition and protection.

1. Rights in respect of one's own person, a right of life, reputation liberty etc. In everyone of these rights the object of the right is one's life, reputation. Liberty etc, something immaterial. Nevertheless they are legal rights for the interest has received protection in the form of law.

2. Rights in respect of domestic relations. The right a husband has to the society and affection of his wife and vice versa or further to that of his child. There again the interest or the object of the right is love, affection and society of another.

3. Right in respect of other rights. These are rights to others If I enter into an agreement for sale with you to buy your house, I have a right vested in me, that on the fulfillment of the conditions of the agreement the right of ownership of the house is to be conveyed to me by a duty executed and registered deed of conveyance. Until this takes place my right is merely a right to have a right vested in you be conveyed to me in due course of time. This is called a jus ad rem.

4. Right over immaterial property. These are patent rights, copy rights, trade marks and such like. Here the subject of the right will be the idea of invention or the ways of expression used by the author etc.

5. Right to services: These are rights vested in one person to the service of another, rights between master and servant, doctor and patient. Here the subject matter of the right is the skill, knowledge, time of the other.

So from the above discussion it is quite clear that legal rights are solely not confined to material things only the law chooses interests in immaterial rights also for protection and recognition.

**Rights in a wider sense:** A legal right in its generic sense is of many kinds. There are four different kinds of legal rights 1) Rights stricto sensu - These are the rights which we have so far been discussing. They are the correlatives of legal duties 2) Liberties, correlatives or No rights; 3) Powers correlatives of subjects; 4) immunities correlative of disabilities.

Liberties, powers and immunities are also legal right. The interest in respect of which they exist are protected and recognized by the law. They are also benefit derived from the law. The law enforces them. But they are also fundamentally different from rights stricto sensu in that none of them have corresponding duties.

**Liberties and no-rights:** A liberty is also legal right, its interests protected and recognized by the law. But unlike a right in the strict sense a liberty has no corresponding duty. To illustrate I am the owner of a piece of land. I have the right of ownership over it a right of use and enjoyment. This right is a right in the stricter sense and has a corresponding duty imposed upon persons generally that they shall have a right to enter upon my land which corresponds to a duty on persons generally to stay off my land. On the other hand although persons generally have a duty to stay off my land I am under no duty to stay off my land. I have the liberty of entering upon my own land. Thus a duty is the opposite of a liberty, but the correlative is a no right.

Right stricto sensu Duty x Liberty No-right

(The braces indicate correlatives and the lines opposites)

In the right duty relationship the emphasis on what I may force another to do, or to refrain from doing. But a liberty represents what I can do for myself free of the possibility of legal interference by others have the liberty to breathe, to play etc and the law will protect my liberty if others interfere with its exercise.

The correlative of a liberty is a no right, when liberty is there opposite of a duty naturally the opposite of a right should be a no right a No right indicates the absence of right. When I have the liberty to play tennis, you have a no right to say that I shall not play and when I have the liberty not to do a thing, it corresponds to a no right in you that it shall be done.

(Space for Hints)

**Powers and Subjections:** A power is an ability on the part of a person to produce a change in a given act. In one sense, I have the liberty to make a will since persons generally are under a duty not to interfere with the free exercise of my power. But the question which arises under this head is, not my liberty to write words on paper, but the effect which those words will have on the distribution of my property. The notion of a power is by exercise, the legal rights of another may be affected by the receipt of the report in question. Liberty is also a legal right but it differs from power in that, when I exercise my liberty no legal right of another are affected either for better or worse. Not so in the exercise of a power. The legal rights or legal relation of another or others are affected for better or worse but power resembles a liberty in that both have no correlative duties. My powers corresponds to no duty on another or others. The power to make a will, the power to alienate property, the power of judicial officers to adjudicate disputes is a few examples of power. A power relates to the sphere of I can. The correlative of power is subjection. It is the position of one who is affected for better or worse by the exercise of a power. X in his exercise of a power makes a gift to Y. The legal position of Y is improved. When a convict is punished his position is worsened.

**Immunities and disabilities:** An immunity is a freedom on the part of one person against having a given legal relation altered by a given act or omission on the part of another person. E.g. a judge immunity from having to pay damages for defamation because of anything he has said in the course of a trial.

The correlative of immunity is disability It A is immune from taxation; authorities have no power to place him under a duty to pay. The taxation authorities are under a disability. So an immunity belongs to the sphere of you cannot.

Thus disability is the opposite of power, and immunity the opposite of subjection. The table will be.

| | |
|---|---|
| 3. Power | 4. Immunity |
| Subjection | Disability |

(The braces indicate correlatives and the lines opposite)

(Space for Hints)

One value of the above table is, that it emphasizes that a particular legal relationship may give rise not to a single and duty relationship but to abundle of rights, liberties powers and immunities. Thus if A and B made a contract each has a right against the other that the contract shall be fulfilled. If A breaks the contract, B has the power to sue for damages and to enforce execution. Both A and B have a claim against persons generally that they shall not knowingly induce breach of the contract.

Of all these four kinds of legal rights, the most important are the rights stricto sensu or rights which are the correlatives of duties.

## 4.5. CLASSIFICATION OF RIGHTS

**4.5.1. Perfect and Imperfect Rights:** A perfect right corresponds to a perfect duty and an imperfect right corresponds to an imperfect duty. A duty is said to be perfect when it is not merely recognized by the law, but enforced. What do we understand by the expression enforced? A duty is enforceable when an action or other legal proceedings, civil or criminal, will lie for the breach of it, and when the judgment and decree obtained by the plaintiff against the defendant will be executed against him, if needs be, through the physical force of the state. From this is it quite clear, essence of a legal right is recognition but that of a perfect rights is enforceability. So where a duty is perfect the corresponding right is also perfect. The element of enforceability is some times said to be the sine qua non of a legal right which is but the maxim **ubi jus ibi remedium** (Where there is a right there is a remedy). These qualification so must, however, be made to this statement, for enforcement is only the most obvious mark of recognition.

Firstly, the law will not always enforce the right, either because it is not possible to enforce them once the duty is broken or because public policy is such that it is not expedient to enforce them, for example assault or breach of promise to marry. Secondly the state may lack the necessary machinery to enforce the right, for example, international law and the decrees of the courts of international justice. Thirdly, there are certain rights sometimes called imperfect rights which the law recognize but will not enforce directly. They are legal rights, but as the element of enforceability is absent they are not perfect rights but only imperfect. But these imperfect rights, are capable of becoming perfect. For example, a

**Check Your Progress**

4. What is meant by Perfect rights?

(Space for Hints)

statute barred-debt cannot be recovered in a court of law, but for certain purposes the existence the debt will raise the right to become a perfect right. The creditor has no claim for the money, the debtor has the liberty to pay if he so desires, but no claim to the recovery once he has paid it. An imperfect right is sufficient to support any security that has been given for it. If I have pledged a chattel to you for Rs. 100 and not repaid the loan for three years, then the debt beery of the chattel. The imperfect right to the debt is sufficient to support the security given for it.

**4.5.2. Rights in Rem and rights in Personam :** **A right in rem** is a right available against persons generally. But **a right in personam** is a right available against a determinate person or determinate class of persons. As the owner of a farm I have a right against persons generally not to be interfered with the possession, use and enjoyment of corresponding right. The relationship of creditor and debtor is one such. The creditor had positive right to recover money due and the debtor is bound by a positive duty to repay the loan. When the debtor performs his duty the creditor is positively benefited a negative right corresponds to a negative duty. The person bound by the duty has to refrain from causing positive harm to the owner of the right.

**4.5.3. Proprietary and personal rights:** In this classification of man's property is contrasted with his person or statue, rights to land, houses, cattle, business are all proprietary. They are designated to because they are worth money, and therefore constitute a man's established assets or wealth. But a man's right to reputation, life, liberty, to the society and affection of his or her spouse and children are all personal as they pertain to his status or standing in the law. They are worth nothing and are of no economic value.

| Check Your Progress |
| --- |
| 5. What is meant by Rights in rem? |
| 6. What is meant by Rights in Personam? |
| 7 Distinguish between proprietary rights and personal rights? |

For a beginner it is enough if he is told the essential distinction between the two as, **proprietary rights are valuable, they are worth money or they are of economic value, where as personal rights promote merely the well being of a man.**

Some jurists have advanced the test of transferability, if a right is transferable it is only because it is valuable and so such a right is a proprietary right and the non transferable rights are personal, number of rights worth money

that cannot be transferred, for instance, a pension can not be transferred, a right of maintenance, a non transferable ticket, non of these can be, transferred. So Salmond has suggested, that the true test of a proprietary right is not whether it can be alienated but whether it is worth money.

Proprietary and personal rights can be both right in tem, as well as rights in personam, for example, valuable contract which is a right in personam, is as much proprietary as rights to lands, houses and the farm. A farm is a res or material object, a tangible thing but a right in rem need not relate to tangible trees. Thus a right to reputation is in rem for it is available against the whole world. So too a farm is property whereas reputation belong to my status only.

For example, I lease out my farm to you. My right to collect rent is only against you and not against the world at large. So the right to receive rent is only a right in Personam i.e., available only against you and not against persons generally. I enter into a contract with you. My right to enforce fulfillment of the contract is only against you. So my right under a contract is, only a right in personam.

If you examine all the rights in rem which are gifts over houses, lands, chattels, rights to life, liberty, reputation you will notice that the content of every one of them is a forbearance. So rights in rem are always negative. Contra, right in persona are usually positive as the content of the right is to do something for example agreements of all kinds (e.g. debts). But a right in personam can be negative, when a negative duty is specifically imposed where in a contract a person promises not to do a specific act.

**4.5.4. Positive and Negative Right:** By and large it is the nature of the duty which determines the character of the right. We have already seen that to understand the nature of a perfect right we have to study the nature of the corresponding duty. If the duty is perfect then we say the right is perfect. So too where this classification is concerned. A positive duty makes for a positive right and negative duty makes for a negative right. So we say a positive right corresponds to a positive duty and a negative right correspond to a negative duty.

A positive duty is one, which the person bound by the duty has to do something positive in favour of the person who has the chattels rights which a

(Space for Hints)

man has as a husband, parent are as much personal as rights to reputation, life etc.

**Rights in repropria and rights in re aliena:** This classification is exclusively of proprietary rights. A proprietary either a right in repropria or a right in re aliena. This is Roman law division of property not jura in re propria and jura in re aliena.

Salmond defines a right in re aliena, which is also called an encumbrance. as one which limits or derogates from some more general right, belonging to some other person in respect of the same subject matter. All others are rights in re propria. A few illustrations will help to distinguish rights in re propria from rights in re aliena.

I am the owner of a farm. I have a right over my own property. My right is a right in re propriety. So a right in re priories is a right over one's own property.

I lease out my farm to you. You get a right over my farm. This right is called a lease hold right. This right a your cannot be a right in re propria, because the farm is mine. Your right is a right over the property of someone else. This is a right in re aliena it is also called an encumbrance. So a right in re aliena is a right over the property of someone else. In this illustration both the rights, the right in re proria and the right in re aliena co exist in respect of the same thing. Till the lease expires I cannot exercise my rights of use and enjoyment where the farm is concerned, because you have the right to the exclusive use and enjoyment of the farm. You can exclude not nobly the rest of the world, but the owner as well. So my right in re propria is subject to your right in re aliena. My right is limited by the adverse right vested in you. You are an encumbrance and your right is an encumbrance and my farm is encumbered. My right is the servient while yours is the dominant right.

Other encumbrances on property are mortgages, pledges, loans and hiring of chattels and servitudes.

There is nothing to prevent one encumbrance from being further encumbered. There can be an encumbrance upon an encumbrance; for example, a

(Space for Hints)

lessee may sub let property; a mortgagee may lease, the lessee or the mortgagor has the dominant right but as against the sub lessee or the lessee of the mortgage has the servient right because their right is subject to the right in re aliena of the sub-lessee or the lessee of the mortgage.

In general, where right to property are concerned, a man must so use his property as not to infringe the property and rights of others. Supposing you are the owner of a heap of stones, can you say, these stones are mine, I shall do what I please with them, for the law has given me the right of absolute use and enjoyment? So can you take these stones and pelt them at every passer by or throw them through your neighbours window? If you indulge in such conduct you will soon find yourself in doldrums, because the law does not confer upon you absolute right of use and enjoyment, but only a general right of use and enjoyment. Ownership on material things is restricted by the maxim scatter two out all tum non addas. This maxim also means, don't make a nuisance of yourself to your neighbour. To put it in a nutshell your liberty ends where his nose begins. This is an observation from the famous cane swinging case, and applies not only to the owner of the cane but also to its borrower.

To summarise, there can be two kinds of restrictions on ownership of material things. One, the artificial restriction brought about by way of encumbrances vested in favour of other persons and two the restrictions brought about by the maxim **sic utter two ut alienum non lead,** as which determine the natural and normal boundaries of right.

So a servient right can be defined as one which is not merely limited as all right are limited, but is a right so limited that its ordinary boundaries infringed.

**4.5.5. Principal and Accessory Rights:** The operation of an accessory right is just the opposite of a right in re aliena. The former operates beneficially upon another right viz, the principal right, increasing the scope of its operation whereas the latter operates adversely on there are re proira, which is limited by the right in re aliena. Thus a security is accessory to the right secured; a right of action is accessory to the right for whose enforcement it is provided. As a matter of fact an accessory right is created to secure the enjoyment of the principal right

**Check Your Progress**

8. What is meant by Servient right?

(Space for Hints)

by compelling the performance of the principal obligation, such as the repayment of a debt.

**4.5.6. Legal and Equitable rights:** We have discussed in an earlier lesson the distinction between law and equity. I hope you remember, I had mentioned that the judicature act of 1873 in England, was enacted to bring about a fusion of the two rival systems of law that were administered side by side but in rival systems of courts. But all that this act achieved was to bring about a fusion of the two system of courts, the courts of common law and chancery courts into one called the high court of judicature. So even to the present day the distinction between legal and equitable rights, estates and remedies are very much alive.

Let me also point out to you that Indian law does not recognize such distinctions as mentioned above. Every right, estate and remedy is legal. Even though they have been borrowed from the rules of chancery law, but insular as they are accorded statutory recognition they are only legal rights.

In England upto the year 1925 the passing of the real property act 1925, legal rights, estates and remedies were treated as having greater authority than its equitable counterparts. Since 1925 the common law has so far unbent itself as to recognize equitable rights, estates and remedies as equal in authority, thus reducing the distinctions between them to a base minimum of mere nomenclature perhaps not to forget their origin.

The distinction between legal and equitable rights are as follows:

1. Both legal and equitable remedies are available for the enforcement of legal rights. But only equitable remedies will be available for the enforce met of equitable rights.

2. Legal rights are automatically enforced on proof of their existence but where equitable rights are concerned the enforcement of them depends upon the discretion of the court.

3. Equitable rights are easier of creation as they do not stress of form like legal rights for example, a legal mortgage can be created only by deeds but an equitable mortgage can be created by a mere deposit of title deeds of the property given as security.

**Check Your Progress**

9. Distinguish between legal and equitable rights.

4) Equitable right can be easily destroyed. As a between two inconsistent legal rights or two inconsistent equitable rights claimed adversely by two different persons over the same thing the same time, the general rule is that the earlier in point of time take precedence over the later. The maxim is **Qui pre est tempore portier est jure.**

(Space for Hints)

But where legal and equitable rights conflict and the equities are equal, the legal right will prevail over the equitable right even thought subsequent to it in origin provided two conditions are satisfied. They being, firstly, the owner of the legal right acquired, the right for value and secondly with out notice of the prior equity. But after 1826 both the rights are treated on an equal footing.

**4.5.7. Legal and Natural rights:** A legal right is one where the interest is recognized and protected by a rule of legal justice, the latter by a rule of natural justice.

Bentham criticizes this division of right into legal and natural rights. To him all rights are legal rights and the creations of the law he describes natural rights as nonsense upon stills.

But it cannot be denied that there are natural rights. If natural justices is a truth, the same must be admitted of natural rights. But to the lawyer there is only one kind of right and the right is a legal right which the state establishes and declares as such.

**4.5.8. The legal nature of right against the state:** We have already seen that a state can have legal rights and be bound by legal duties also. Like wise the subject can have the rights against the state. These rights of the subject against the state can be enforced against the state in court of law. But there can be no enforcement of the judgmenet and decree obtained against the state , for the strength of the law, is the strength of the state and such strength cannot be turned against the state itself. Whatever duties the state recognize as owing by it to its subjects, it fulfils them of its own free will and good pleasure, or in other words there can be no compulsion, the element of enforceability is absent. So the rights against the state through legal rights, are not perfect rights, they are only imperfect rights.

(Space for Hints)

## 4.6. CLASSIFICATION OF DUTIES

**Duties may be classified as follows:**

1. **Relative and absolute duties:** A relative duty is correlative to a right in a determinate person or persons. An absolute duty has no corresponding right belonging to any one determinate person or persons.

2. **Positive and negative duties:** A positive duty is to do something it is an act. The duty of a debtor is positive. When he does the act or performs his duty both the right and duty are extinguished. So a positive duty can be extinguished by performance of duty. A negative duty is always a forbearance. It is duty not to cause harm to another or others. Performance does not extinguish either the duty or the right. So a negative duty is a continuous duty. You are in duty bound not to hurt another, you have to continue fulfilling this day in and day out, so long as that other is alive.

3. **Primary and Secondary Duties:** These duties are the correlatives of primary and secondary rights. Primary duties exist per se i.e. indefinitely of any other duty, for example, the duty not to hurt another is primary. A corresponding right not to be hurt is vested in another or other persons. If the duty is broken it gives to a secondary duty in the form of an obligation to pay damages and the victim has a secondary right a right to damages. So a secondary or sanctioning duty imposed to compensate and breach of a primary duty.

## 4.7. SUMMARY

The state provides for men a suitable conditions of social life. This is done by the creation of relationships between persons by controlling human conduct. This is usually done by the law commanding people either to do certain things or forbear from to facilitate operation or performance of these duties the law creates right. The conception of right is therefore one of the fundamental significance in legal theory. According to Salmond rights and duties are necessarily correlated. He says there can be no right without a corresponding duty, or duty without a corresponding right, there can be no husband without a

wife or father without a child. The importance of rights and duties and its different types and characteristics are thoroughly discussed in this lesson

(Space for Hints)

## 4.8. KEY WORDS

Subjections - state of being subject to another

Immunities - safety,

Violation - break forcibly

Correlative - show the relationship between

## 4.9. ANSWER TO CYP QUESTION

For Question No. 1 - Refer section 4.1

For Question No. 2 - Refer section 4.3

For Question No. 3 - Refer section 4.4

For Question No. 4 - Refer section 4.5.1

For Question No. 5 - Refer section 4.5.2

For Question No. 6 - Refer section 4.5.2

For Question No. 7 - Refer section 4.5.3

For Question No. 8 - Refer section 4.5.4

For Question No. 9 - Refer section 4.5.6

## 4.10. MODEL QUESTIONS

**A) Long Answer Questions**

1. Explain and distinguish: Rights in re propria and rights in re aliena
2. Explain the characteristics of a legal right
3. Distinguish between :-
   a. Perfect right and imperfect right
   b. Right in rem and right in personam.

**B) Short Answer Questions**

4. Define right State the essentials of a Right.
5. What is legal right ? what are the essential of legal right?
6. What is meant by Positive and Negative right ? How it correlates with duty?

# UNIT - 5

# TITLES - PERSONS

## INTRODUCTION

The title is the source of a right. Without a title there can be no right, A title is nothing but the set of facts or events by virtue of which a right comes to be vested in its owner. I have a right of ownership in certain property and that is because certain facts are true of me viz. I have paid money and got in my favour a deed of conveyance duly executed and registered in respect of that property. These facts are if true of you so you get right of ownership over that property. While dealing with rights and duties we saw that every right involves a title or source from which it is derived. If the law confers a right upon one man which it does not confer upon another the reason is that certain facts are true of him which are not true of another and these facts are the title of the right. In this lesson we are going to study elaborately Title and related facts.

## OBJECTIVES

- To know the definition of Title and Vestitive and Divestitive fact
- To understand the terms Acts of Law and Acts in the Law
- To learn more about agreement and essentials of agreement - different types of person - Natural and Artificial person
- To know about various theories of nature of corporate personality.

## STRUCTURE

5.1. Vestitive factors

5.2. Acts in the law and Acts of Law

5.3. Agreement

5.3.1. Voidable Agreement

5.4. Persons

5.5. Legal status of Natural persons

5.5.1. Lower Animals

5.5.2. Dead person

5.5.3. Unborn persons

5.5.4. Artificial persons

5.6. General characteristics of Corporate personality

5.6.1. Rights and liabilities of corporation

5.6.2. State as corporation

5.6.3 . Public corporation

5.7. Theories as to the nature of corporate personality

5.7.1. The fiction Theory

5.7.2. The concession Theory

5.7.3. Bracket or Symbolist theory

5.7.4. Purpose Theory

5.7.5. Honfeld's theory

5.7.6. Kelsen's theory

5.7.7. Realist Theory

5.7.8. Roganisam Theory

5.8. Summary

5.9. Key words

5.10. Answer to CYP questions

5.11. Model Questions

## 5.1.VESTITIVE FACTS

Salmond defines a title as the de facto antecedent of which the right is the de jure consequent' some rights are inborn others have to be acquired. Of whichever kind the right might be a title is equally requisite as a title is the set of facts or events by reason of which the right becomes the subject matter of ownership.

(Space for Hints)

Facts not only create rights, they also transfer and destroy rights. Bentham who prefers to call those facts which create rights as 'Investitive' and those which destroy them as 'divestitive.'

Vestitive fact is one which determines positively or negatively the vesting of a right in its owner. The facts which confer rights upon a persons are called investitive facts or titles, whereas facts which cause the loss of rights may be called as divestitive facts. The term title used is a generic term to include both investitive as well as a divestitive facts.

Vestitive facts or titles are of two kinds voluntary and involuntary whether they are the result of the exercise of any human will or independently of it or due to the operation of law

Just as titles are of two kinds, divestitive facts are also of two kinds. They are either distinctive or alienative. The former are those which divest a right by destroying it. The latter divests a right by transferring it to some other owner. The receipt of payment by the seller for goods sold is divestitive of the rights of the seller over his goods.

It is plain that devestitive titles and alienative facts are not two different classes of facts, but are merely the same facts, looked at from two different points of view. The transfer of a right is an event which has a double aspect. It is the acquisition of a right by the transferee and the loss of the right by the transferror. The vestitive fact if considered with reference to the transferee is derivative title while from the point of view of the transferror it is an alienative fact. Purchase is a derivative title but sale is an alienative fact. Yet they are merely two different side of the same event.

These different classes of vestitive facts correspond to the three chief events in the life history of a right viz, its creation, its extinction and its transfer. By an original title a right first comes into existence; by an extinctive fact it is wholly destroyed; by deteriorative titles and alienative facts on the other hand rights are transferred from one owner or another owner.

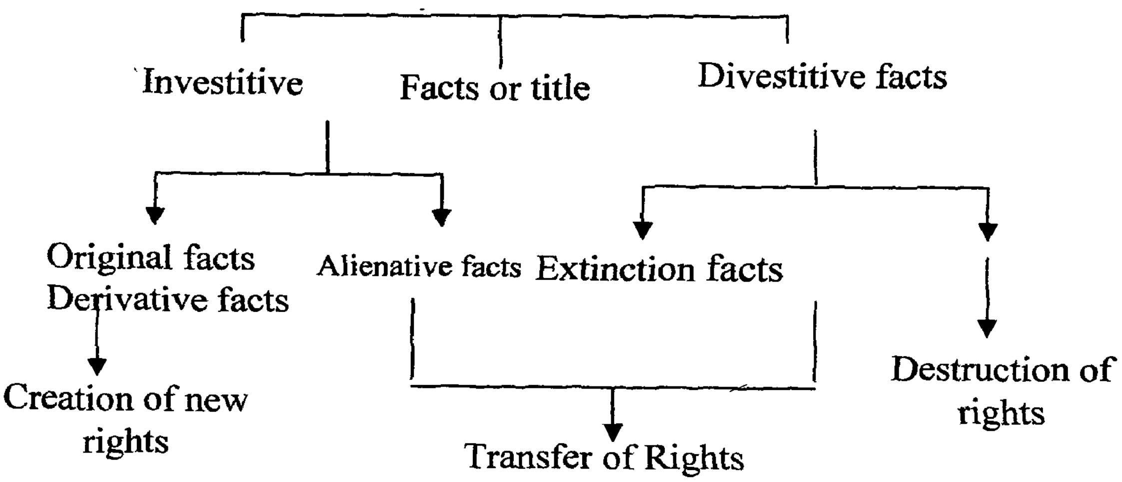
I have captured a wild animal. I become its owner because a certain fact is true of me, and that fact namely the fact of capture which vests in me the right

of ownership in that wild animal. I am born with a right to life and that is because a certain events have occurred which event is my being born alive. So whether a right is inborn or acquired a title is equally a requisite.

Facts not only create rights, they also transfers and destroy rights. I sell my wild animal to you. This fact transfer the right of ownership in the animal vested in me to you. I lose a book or the book is accidentally or deliberately destroyed, these facts cause the loss or destruction of the right.

So facts not only create rights, they transfer rights, they also destroy rights. The facts are called Vestitive facts. The different kinds of vestitive facts are illustrated in the table shown below.

Vestitive facts




The above classification pictures the life history of a right, its creation transfer and destruction. Only one part of the table needs explanation i.e., derivative facts and alienative facts are not two kinds of facts they are the two sides of the same fact or event. From the point of view of the transferor it is an alienative fact, on the side of the transferee it is a derivative fact, on the side of the transferee is a derivative title, both involve the transfer of an already existing right where as an original title creates a new right, never before existing such as rights to res nullius (ownerless things). So a vestitive fact can be defined as one which terminate, positively or negatively and vesting of a right in its owner.

(Space for Hints)

## 5.2. ACTS IN THE LAW AND ACT OF THE LAW:

Vestitive facts are either voluntary or involuntary depending upon whether they occur due to the exercise of ones own free will or independently i.e., due to the operation of law. The former are called acts in the law or acts of the party and the latter acts of the law.

Acts in the law (Voluntary acts)

| | | |
|---|---|---|
| I capture a wild animal | - | creation of a (new) right, |
| I sell my property to you | - | transfer of a (already existing) right. |
| I destroy a book | - | destruction of a right. |

Acts of the law: (involuntary acts in pursuance of the law's purpose) The court orders the construction of a wall creation of a (new) right.

The creditor takes the goods in execution of a decree-transfer of a right.

The court orders the destruction of a thing-destruction of a right.

Acts in the law may be divided into unilateral and bilateral acts, depending upon whether they require the consenting will of one only or several.

Unilateral-capture of a wild animal or destruction of a thing.

Bilateral-agreements of all kinds (Sales, leases, mortgages etc)

## 5.3. AGREEMENTS:

Of all vestitive facts, acts in the law are the most important and among acts of the law, agreement are entitled to the chief place. The importance of agreement as a vestitive fact lies in the universality of its operation. By what reasons then is law induced to allow this far reaching operation to the fact of agreement or contract? Why should the mere consent of the parties be permitted in this manner to stand for a title of a right? Why should promises be enforced? what is the justification of contract law?

An agreement requires the following five essential elements: 1. There must be atleast two parties. 2. All the parties must have a distinct common intention. 3. Each must communicate his intention to the others concerned. 4. The

common intention must be to affect legal relations, by creating legal obligation.
5. The legal relation intended to be effected must be those of the parties.

(Space for Hints)

*Classes of Agreement:* Agreements are divisible into three classes for they either create rights or transfer them, or extinguish them. Those which create rights are themselves distinguishable as contracts and grants. A contract is an agreement which creates an obligation or right in personam between the parties to it. A grant is an agreement which creates a right of any other description. Examples being grants of leases, easements, charges, patents, franchises etc. An agreements which transfers a right may be termed generally as an assignments. One which extinguishes a right is a release, discharge or surrender.

A contract is an agreement intended to create a right in personam between the contracting parties. No agreement is a contract unless its effect is to bind the parties to each other by the *vinculam juris* of a newly created personal right. It commonly takes the form of a promise or set of promises. That is to say a declaration of the consenting wills of two persons that one of them shall be henceforth be under an obligation to the other assumes in the form of an undertaking by the one with the other to fulfill the obligation so created. Not every promise however amounts to a contract. To constitute a contract there must be not merely a promise to do a certain act, but a promise express or implied to do this act as a legal duty.

There are four distinct kinds agreement.

1. Contracts :- creating rights in personam,
2. Grants :- creating rights of any other kind
3. Assignment :- transferring rights
4. Releases :- extinguishing rights.

It often happens than an agreements is of a mixed nature and so falls within two or more of these classes at the same time. Thus the sale of a specific chattel is both a contract and an assignment for it transfers the ownership of the chattel and at the same time creates and obligation to pay the price.

**Check Your Progress**

1. What are the essentials elements required for an agreement?
2. State the different kinds of agreements?

(Space for Hints)

### 5.3.1.Void and Voidable Agreements:

In respect of their legal efficacy agreements are of three kinds being either valid, void or voidable. A agreement is one which is fully operative in accordance with the intent of the parties. a void agreement is one which entirely fails to receive legal recognition or sanction, the declared will of the parties being wholly destitute of legal efficacy. A voidable agreement stands midway between these two cases. It is not a nullity by its operation is conditional and not absolute. By reason of some defect in its origin it is liable to be destroyed or cancelled, at the option of one of parties to it. One the exercise of this power the agreements not only ceases to have any efficacy but is deemed to have been void *ab initio.* The avoidance of it relates back to the making of if. In other awards a voidable agreement is one which is void or valid at the election of one of the parties to it. A lease determinable on notice or for breach of covenant is not for that reason voidable because when determined it is destroyed not ab initio but merely from then onwards.

Void and voidable agreements may be classified as invalid. The most important causes of invalidity are six in number.

1) ***Incapacity :*** Certain classes of persons are wholly or partially destitute of the power of determining their rights and liabilities by way of consents. Minors, lunatics etc. are said to suffer firm incapacity which precludes them from entering into contracts. Similarly agreements of an incorporated company may be invalid because of *ultravires* rule.

2) ***Informality:*** Agreements are of two kinds which may be distinguished as simple and formal. A simple agreement is one in which nothing is required for its effecting operation beyond the manifestation of the consenting wills of the parties. A formal agreement on the other hand is one in which the law requires not merely that consent shall exist but that it shall be manifested in some particular form in default of which it is held of no account. Thus the intention of the parties may be held effective only if it expressed in writing signed by them to it must be acknowledged

by witnesses etc. The leading purpose of such forms is two fold. They are in the first place designed as pre-appointed evidence of the fact of consent and of its terms, to the intent that this method of determine rights and liabilities may be provided with the safeguards of permanence, certainty and publicity. In the second place their purpose is that all agreements may be their help be the outcome of adequate reflection. Any necessary formality has the effect of drawing a sharp line between the preliminary negotiations and the actual agreement and so prevents the parties from drifting by inadvertence into unconsidered consent.

3) ***Illegality:*** In the third place an agreement may be invalid by reason of the purposes with which it is made. To a very large extent men are free to agree together upon any matter as they please; but this autonomous liberty is not absolute. Limitations are imposed upon it party in the interest of the parties themselves and partly on behalf of the public. There cannot be any valid contract if it is for a purpose or object prohibited by law.

4) ***Error or mistake :*** Error or mistake as a ground of invalidity is of two kinds which are distinguishable as essential and unessential. Essential error is that which is of such a nature as to prevent the existence of any real consent and therefore of any real agreement. The parties have not in reality meant the same thing and therefore have not in reality agreed to anything. Their agreement exists in appearance only and not in reality. The effect of error of this kind is to make the agreement wholly void.

An essential error on the other hand is that which does relate to the nature or contents of the agreements but only to some external circumstance serving as one of the inducement which led to the making of it. The parties have not agreed to the something in the same sense though one of them would not have made that agreement had he not been under a mistake. The general rule is the unessential error has no effect on the validity of an agreement. This rule however is subject to an important exception for even an unessential error will in general make an

(Space for Hints) agreement voidable at the option of the mistaken party tf it had been caused by ~~the~~ misrepresentation on the other party.

5) ***Coercion:*** In order that consent, may be firstly allowed as a title of right it must be free. I must not be under of any form of compulsion or undue influence otherwise basis of its legal operations fails.

6) ***Want of Consideration:*** A further condition very commonly required by English law for the existence of fully efficacious consent is that which is known by the technical name on consideration. This requirement is however is almost wholly confined to the law of contract, other forms of agreement being generally exempt from it. A consideration in its widest sense is the reason, motive or inducement by which a man is moved to bind himself by an agreement.

7) There are very few rights, which cannot be acquired transferred or extinguished by agreement between persons.

In respect of their legal efficacy agreements are of three kinds, being either valid, void or voidable. A valid agreement is fully operative in accordance with the intention of the parties. A void agreement entirely fail to receive legal recognition and the declared intent of the parties is wholly destitute of legal efficacy. A voidable agreement stands midway between the two. It is not a nullity. Its effectiveness depends upon conditions. If the concerned party avoids it, it becomes void from its inception, but if the concerned party elects for it then it becomes a valid agreement.

## 5.4. PERSONS

### Nature of Legal Personality

The word person is derived from the Latin word persona. This term has a long and interesting history. Originally it meant simply a man. Later it denoted the part played by a man in life and still later the man who plays it. In the sense every human being has a persona. In later Roman law the, term acquires a more specialized meaning, being synomous with caput or capacity. Finally the

(Space for Hints)

term came to denote a being capable of sustaining legal rights and duties. These changes in the meaning of the words are reflected in the history of law. Early law regarded all human beings alone possessing personality. As law and legal system developed certain changes were necessitated. Some human beings like slaves ceased to have any legal personality while things and groups of people acquire such.

For the purpose of legal personality a person is any being whom the law regards as capable of rights or duties. Persons are divided into two kinds distinguishable as natural and artificial (legal).

A natural person is a human being

Legal persons are beings real or imaginary who for the purposes of legal reasoning are treated in greater or less degree in the same way as human beings. This led Salmond to remark "In law there may be men who are not persons and conversely persons who are not men"

Salmond said, so far as legal theory is concerned a person is any being whom the law regards as capable of possessing rights and duties.

Gray's definition of legal person is an entity to which rights and duties may be attributed. Or for the purpose of the law we find that the law does not stop with human beings. It goes for a field and recognizes any unit or entity as a person by attracting to it a legal personality i.e., legal rights and legal duties.

So in law, there are two kinds of legal persons natural persons and artificial or juristic persons. Natural persons are persons in fact, as well as in law, while artificial persons are persons in law, but not in fact. To natural person the law attributes personality in accordance with reality, and to artificial person by way of fiction when there is none in fact.

Although in common parlance a person, means a living human being, yet in law there are persons who are not human beings and human beings who are not persons. The idol in a Hindu temple, a joint stock company, a Charitable Estate are examples of persons who are not human beings.

(Space for Hints)

Whether the law awards legal personality to trees, sticks or stone, from the juristic angle legal personality remains, in essences merely a convenient juristic device by which the problem of organizing rights and duties is carried out.

## 5.5. LEGAL STATUS OF NATURAL PERSONS

### 5.5.1.Lower Animals:

The only natural persons are human beings Beasts are not persons either natural or legal. However in primitive legal systems they have been endowed with rights and duties. For example, in Greek law animals were tried for offences to human beings. In the middle ages, trial of animals continued. In all these cases the animal is considered to be capable of sustaining duties and therefore, to this extent a legal person. English law derived from early Aryan custom, the conception that the animal which has occasioned the serious injury or death to a human being must be surrendered to the vengeance of the injured party or his relatives.

But at the present day animals are no more than chattels incapable of legal personality. No doubt their interests are protected by the law, but they have no legal rights as their interests are not recognized. So an injury done to them does not amount to a wrong towards the animal, but may be a wrong towards its owner or the public at large.

But the law protects animals. So two things are recognized 1) Cruelty to animals is made a criminal offence, and 2) a trust for the benefit of a particular class of animals as opposed to one for an individual animal are valid and enforceable as public and charitable trust.

In re Dean (1889) it was held that where the testator had created a trust fund for the maintenance of his horses and found that the trustees could not be found fault with if they maintained those animals. It was further held that in case the trustees called to maintain the animals out of the trust fund, it would not amount to a breach of trust. As interpreted it means that it is a charitable trust fund and enforceable as such because it is for a class of animals and as the

animals have no legal personality no wrong can be committed against them, such that non maintenance of them will not amount to a breach of trust.

(Space for Hints)

### 5.5.2. Dead Person

If birth is necessary to create rights, so death in general, ends rights. Once a person is dead there is nothing that concerns him any longer, neither has he any more a person even in anything that is done under the sun. A dead man has no right even to his own body. A corpse is not property and cannot be owned by any one and so there cannot be theft of a dead body. So a dead man has no personal or legal personality. But still it is said that a dead man has three rights.

1) **A right to burial:** Criminal law insists and secures decent burial for all dead men, and violation of a grave or prevention of burial or creation of a corpse is a criminal offence. But is this really a right of the dead? As pointed out a dead man has no interest even in his own body, much less in its burial so this rights is that of the living citizen, who would not like to see dead bodies lying about.

2) **Right of reputation :** It is said that a dead man has a right of reputation. In English law to libel the dead, is not an offence known to our law. The dead has no rights and can suffer no wrongs. But in the legal systems of every civilized country to publish defamatory words about a deceased person is actionable at the instance of the members of his family, if it is done with intent to bring scandal in his family and to provoke them to a breach of the peace; or affect the reputation of livelihood of the living legatees. So let our watch word be de mortuus nil nisi bouum be of the deceased nothing without good, speak nothing but good.

3) **Right to his testamentary dispositions :** It is said that a dead man has a right that his testamentary dispositions regarding the devolution of his property be respected by the law. That ordinarily the last will and testaments of a testator is given effects to, does not mean that a dead man has such a right, it only means that the right of the living heir is recognized by the law. Any testamentary disposition which is opposed to public policy and morality the law will decline to enforce. In Dravia Sundaram v. Subramania (1945) Mad 217 court declined to give effect to the testamentary disposition of the testator, which directed that his property be used to build and maintain a tomb over his grave It was held that

**Check Your Progress**

3. What are the rights of a dead person?

(Space for Hints)

such use of property is against public policy. So it is quite clear that a dead man has no legal personality.

### 5.5.3.Unborn Persons:

Unborn persons are said to have legal personality. There are two kinds of unborn persons 1) Persons who have come into existence, but yet to be born i.e. a child in uterus or in its mother's womb and 2) unborn persons in the sense of future generations.

Where the first class of unborn persons are concerned, their rights are well defined by law. Many systems of law regard a child in utero as a person born for many purposes, yet makes the child to take propriety only after birth. So it is conditional on the child being born alive. So, if the child is still born then vesting of right absolutely does not take place. Property rights to its being born alive can be created in favour of such a child. A posthumous child can inherit. In some systems of law a direct gift can be made to child in utero.

A posthumous child can claim compensation for the death of father under the Workmen's compensation Act or the Fatal Accidents Act. Abortion and child destruction are criminal offences the right to life of a child in enventre sa mere is well recognized.

About the second type of unborn persons viz members of a future generations property rights can be created in their favour through the medium of trusts. But here too vesting of the property is dependent upon their coming into existence.

### 5.5.4. Artificial Persons:

As already pointed out the law does not stop with human beings. It takes into account of personality over a wider field.

It attributes personality to things are groups of persons by way of fiction when there is none in fact. These are called fictitious or artificial persons. These artificial persons can be divided into three classes. 1. The idol in a Hindu temple, a trust estate, etc., these contain no human element at all 2. The crown, the Post Master General, a Bishop, a joint stock company etc. They contain human

**Check Your Progress**

4. What are the rights of unborn person?

elements but it is their perpetual office or the groups as such that is regarded as a corporation or fictitious person 3. Hospitals, libraries and universities. Here what is personified is the institution itself.

## 5.6. GENERAL CHARACTERISTICS OF CORPORATE PERSONALITY:

A corporation is a creature of the law. Either it is a corporation sole or a corporation aggregate apart from the human being or beings it is the perpetual office or the group as such as the case may be that is regarded s a separate distinct, permanent legal person. There is no identity between the legal personality of the corporation on the one hand and human beings on the other. A corporation has a distinct personality given to it by the law. The members are legal persons in their own rights but an act of incorporation results in the creation of a separate distinct legal personality. To illustrate the members of a corporation may be rich, but the corporation may be on the average of bankruptcy and vice versa. The personality, the rights, the liabilities of its members cannot be attributed to the corporation. The members may come and go but the corporation goes on for ever. Even if all members leave or die leaving behind no representative to represent the corporation, the corporation will be deemed to survive. It is not a comminutes but a universitas.

In People's Pleasure Park Co. v. Rohleder, an American case, certain property was alienated to a corporation of Negroes in the face of a covenant, that this property should not be transferred to a coloured person. On the question whether the transfer was valid or not the court upheld the that transfer on the ground that a corporation cannot be deemed to have any colour.

A corporation is district from an unincorporated group of persons such as a firm of partners. A firm of personality is a comminutes. Its personality is the sum total of the personality of its members. The property rights and debts of the firm is the property rights and debts of its members. The members are answerable to the last paise of the debts of the firm. If a member resigns or dies the firm is lissolved. The distinction between a corporation and an unincorporated firm as uch as a partnership is well illustrated by the case of Salomon v. Salomon & Co. td., (1897) A.C. 22. In that case Salomon had a solvent business. He formed a

(Space for Hints)

corporation called Salomon & Co. Ltd. Consisting of himself, his wife and their five children. He sold his solvent business to the company. The company paid him partly in cash and for the balance of the purchase price the company executed debenture bonds in favour of Saloman. Saloman thus became his own preferred creditor. The company finally went into liquidation. The House of Lords held that there was nothing wrong in a person becoming his own preferred creditor under these circumstances; because the personality of the debtor and creditor were not identified. Saloman was the creditor in his individual capacity and the debtor only in his corporate capacity and so the debts of the company cannot be attributed to its members. This case again illustrates the fact that the personality of corporation is distinct from the personality of its members.

**Corporation sole:** A corporation sole is the perpetual office. Salmond has given a classic description of the corporation sole. The living official comes and goes but this off spring of the law remains the same forever. So where a corporation sole is concerned two persons exist behind the same name, one the living official and the other the perpetual office which is the corporation sole. The legal personality of the corporation sole is not identical with that of the official.

The three common characteristics of a corporation are a distinctive name, common seal and a perpetuity of existence.

**5.6.1.The Rights and Liabilities of a Corporation:** A corporation has no physical existence. As one jurist has humorously remarked, it has no body to be kicked and no soul to be dammed. It can act only through its representative, who are its directors, secretaries, shareholders etc.

A corporation is created only for a special purpose and its authority is restricted only to the doing of those acts necessary to the fulfillment of the purpose for which it is created. So the corporation has only a limited sphere of authority and this authority is determined by its articles of association or charter or parliamentary authority, whichever it may be which created it. Any act which falls outside the scope of its lawful authority is ultra vires of the corporation and as corporate acts they are null and void for the corporation could not authorize such acts, as it had no such authority to give it to representatives.

**Check Your Progress**

5. What are the rights and liabilities of a Corporation?

Therefore the question is How, then, can an illegal act be imputed to a corporation. If illegal it cannot be within the limits, it cannot be the act of the corporation?

While solving this problem it is well to remember that a wrong full act is either an act of omission or an act of commission. So far as acts of commission are concerned, they are committed by the corporation in persons as they are breaches of duties imposed upon the corporation, such as failure to carry out the purpose for which they have been created and consequently they fall within the scope of its lawfull authority. So a corporation can be held liable for its own wrongs.

When acts of commission are concerned, no doubt these act of its employees fall outside the scope of its lawful authority and yet the corporation is held liable for them. The reason being that a corporation is treated as a person. The corporation is an employer and the law master and servant is applicable to the corporation as well. So the corporation is made vicariously liable for the tortuous acts of its servants on the footing of respondent superior.

Where contractual liability is concerned, public policy demanded that a corporation should not evade its obligations by the plea that it acted beyond its powers. So a corporation is liable for every breach of obligation committed by its representatives.

At the present day a corporation is held liable even for a crime committed by its servants, even crimes requiring an excessive degree of mensrea on the basis that the acts of the supreme directorate are the personal acts of the corporation. The malice of its highest officers who had committed the criminal offence is attributed to the corporation itself. In director of prosecutions v. Kent and Susse Contractors Ltd (1944) K.B. 13 146 the transport manager had sent returns which he knew to be false for the purpose of obtaining petrol. The court held that the company by the only people how could act or think for it had committed the offence. Fraudulent actions of the top officials if needs he will be imputed to the corporation of course it will depend upon the relative position of the officer or agent, and the other relevant facts and circumstances of the case.

(Space for Hints)

**5.6.2. The state as a corporation:** English law has refused to recognize the state as a person, but this difficulty is obviated by the personification of the Crown. It is the crown which owns property is responsible for debts, enjoy rights and privilege, and administers justice. Thus public property is the property of the queen. Public liabilities are the queen's. It is the queen's justice, the queen's revenue, Queen's Navy etc. It is the queen's peace and offences such as treason are offences against the Queen. But all these rights and liabilities pertain to the queen who is a corporation Sole and not to eh Queen who is a mortal person.

The state in India is corporation under Art 300 of the Indian Constitution. The government of India may sue or may be sued in the name of the union of India and the government of a state may use or be sued in the name of the state.

**5.6.3. Public Corporations :** These are of three kinds in English law. Commercial Corporation social service corporations and supervisory corporations. Though this classification is not obtained in Indian law, their characteristics are more or less similar to those of England firstly they have no share holders. The minister appoints the managing board, secondly they have no subscribed share capital. The existing companies like the life insurance companies, railway companies are nationalized. But in transport, Air ways, Banks etc capital are also nationalized and their shares and assets are transferred to the public corporations. The rights, powers etc are delimited by the statute which created them.

## 5.7. THEORIES AS TO THE NATURE OF CORPORATE PERSONALITY:

**5.7.1** ***Fiction Theory :-*** Savingly. Salmond and Holland are the main exponents of this theory.

According to this theory a group has reality or existence, but it has no real personality in the sense that it has of mind and no will such an entity to whom the law attributes legal personality of a corporation is merely fiction, a figment of imagination, created for the purposes of suing and being such on behalf of its members and representing their interest. This theory starts on the assumption that human beings alone are person properly so called. Then it

(Space for Hints)

concedes that some groups or institutions, are regarded as if they are persons. The corporation may be considered as if it is a person distinct form the human being who constitute it and year if need be a departure may be made from this view. Since a corporation can survive to the last of its members all the members of a company may die and yet the company will survive till it is would up under the law: Professor Lower cites the exempt of a case where all the members of a corporation were killed in a bomb blast and still it left unaffected the continued existence of the company. The exponents of fiction theory point out that such a thing is possible only if the corporate personality is the fiction of the law.

*Criticism of fiction theory :-*

a) Not being a real person the corporation cannot have any personality of its own, it has no will, no mind or ability to act. It can have one so much of will, mind or ability as the law imputes to it by fiction. Naturally, it follows, that a corporation cannot do an unlawful act.

b) Right connotes a subject and a fictitious subject cannot have rights.

c) This theory has led to unfortunate political results. For example confiscation of church property has been justified by arguing that as ecclesiastical bodies were fictitious being deriving their existence and legal capacities from the state they could be derived of legal existence and their legal capacities by the same authority. Their property then became *bona vacanita* and passed on to the state.

***5.7.2. Concession theory:-*** This is closely allied to fiction theory. The chief maintains that the legal personality of a corporation is a concession or privilege granted or conceded by the state to the group or association can have legal personality without the permission of the states incelegal personality is-a creation of law and state. Grant of legal personality is a matter of discretion for the state. For this theory identification of law and state is necessary whereas for this fiction theory it is not necessary. This

**Check Your Progress**

6. Explain Fiction Theory.

(Space for Hints)

theory is the product of the area of the power of the national state which superseded Holy Roman Empire.

*Criticism of Concession Theory :* This theory has been used for political purposes to strengthen the state and to suppress autonomous bodies or groups within state. Maitl and remarks that the object of this theory is to keep legal personality under lock and key.

**5.7.3. *Bracket or Symbolist theory*** : The chief exponent of this theory is Thering. This theory maintains that juristic personality is a symbol to help in effecting the purpose of the group.. It amounts to putting a brackest around the members in order to regard them as a unit. Legal personalty is a convenient device of law which establishes a new unit and makes possible a clear distinction between property rights and duties of the corporation on the on behand and members of the corporation on the other. If also enables very complex jural on the assumption that only human beings can have rights and interest and to discover the reals state of affairs the bracket can be removed.

***Criticism:*** It is legally untrue that only individuals can be holders of rights and subject to duties.

**5.7.4. *Purpose theory :*** This theory is developed by Brinz in Germany and Barker in England. According to this theory only human beings can have legal personality and they alone can have rights and duties. The so called uristic persons are not persons at all. The property owned by juristic persons do not belong to any one but it belongs to a *purpose* All juristic persons are merely legal devices for protecting or giving effect to some purposes. Such juristic persons are distinct from their human substratum and are treated a subject less properties without owners. This theory finds practical applications to many charitable organizations or trade unions.

**5.7.5. *Hohfeld's theory:*** Hohfled draws a distinction between human begins and juristic persons the latter being creation of arbitrary rules of procedure Transactions are conducted by men and it is they who become entitled and responsible ultimately. The corporate person is only a

(Space for Hints)

procedural form which is used to work out in a convenient way the mass of jural relation of a large number of individuals and to postpone the detailed functioning out of these relations amount the individuals *inter se* for a later more appropriate action.

**5.7.6** ***Kelsen's theory :*** Kelsen adopts a purely formal approach and recognizes no distinction between human beings and natural persons on the one hand and juristic persons on the other any such distinction is irrelevant since all legal personality is artificial and derivesits legal validity from a superior norm. Personality according to him is only a technical personification of a complex of norms a focal point of imputation which gives a unity to a certain complex of rights and duties.

**5.7.7.** ***Realist Theory :-*** Supporters of this theory are Gierke and Maitland, According to this theory juristic persons enjoy a real existence in a group. The personalty of the corporation is not a fiction of the law but real. So there is no distinction between juristic person and reals persons. Gierke maintains that a groups has a will of its own, independent of the will of the members who compose it. Their existence does not depend upon the permission of the state or law. What is necessary for legal personality is that there should be a group which will automatically develop a group will.

The chief merit of this theory lies in the fact that it represents a reaction against the omnipotence of the state implied in the fiction and concession theories and maintains that legal personality does not depend upon state recognition or concession and it has a separate independent existence that of the state.

***Criticism:-*** a) Realist Theory assets that groups have a reals life. But his is not possible practically. As Professor Wolff points out that it if is true a contract between two companies whereby one is to go into voluntary liquidation should be punishable is an agreement to commit suicide.

b) It is said groups have group will which is independent of wills of its component members. But in reality as Professor Wolff points out that the group will is only the result of mutually influenced wills. If groups are automatically legal persons then every groups

**Check Your Progress**

7. What is realist theory?

(Space for Hints)

viz; a family association should automatically be legal persons. In law this, is not so.

**5.7.8** ***Roganisam Theory*** **:-** This theory is closely-allied to realist theory. According to this theory groups are persons because they correspond biologically to human beings and they are treated is organisms. But this theory based on a special use of the term organism and implications of such biological comparison leads only to difficulties

**The uses and purposes of incorporation:** The main purpose of the corporation sole is to ensure continuity and to enable it to contract either to bind or benefit the perpetual office and for the purpose of suing and being used in its name even for injuries to property while in the hands of his predecessor.

In corporation aggregate, the common interest of large number of members can be conveniently dealt with. It is also used for using and being sued in its name, so legal procedure is simplified. The death or withdrawal of any member does not affect its continuity for an incorporated company is a permanent unity. The above are general uses and purposes of incorporation. As to its special purposes, incorporation is used to enable traders and other business concerns to trade and do business with limited liability, for otherwise a man may have to answer to the last paise for the acts, ends, default of his associates in trade or business. So the risk of ruin is minimized to a large extent and incorporation has therefore admirably adopted itself to modern commercial dealing. If the business is successful the profits are held by the company on behalf of its shareholders; if unsuccessful it is the loss of the capital provided for running the business.

Another advantage of incorporations tax avoidance by means of a limited company made up of family members a tax payer can spread a fluctuating income over the years and divide a large income into smaller parts among the members of the family. Another advantage is found in the tax provisions relating to the commencement and termination business.

## 5.8 SUMMARY

A title is nothing but the set of facts or events by virtue of which a right comes to be vested in its owner. Salmond defines a title as 'the de facto antecedent of which the right is the de jure consequent' some rights are inborn others have to be acquired. Accordingly the agreement. Person includes natural as well as artificial persons. Theories related to personality are fully discussed in this lesson.

## 5.9 KEY WORDS

| | | |
|---|---|---|
| Void | - | invalid |
| Voidable | - | that may be avoided |
| Incorporation | - | The formation of a legal body |

## 5.10. ANSWER TO CYP ANSWERS

| | |
|---|---|
| For Question No. 1 | - Refer section 5.3 |
| For Question No. 2 | - Refer section 5.3 |
| For Question No. 3 | - Refer section 5.5.2 |
| For Question No. 4 | - Refer section 5.5.3 |
| For Question No. 5 | - Refer section 5.6.1 |
| For Question No. 6 | - Refer section 5.7.1 |
| For Question No. 7 | - Refer section 5.7.7 |

## 5.10.MODEL QUESTIONS

### A) Long Answer Questions

1. In law there are persons who are not human beings and human beings who are not persons – elucidate State the main classes of legal persons recognized by Law.

2. Discuss the meaning of Acts of the Law and Acts in the Law.

(Space for Hints)

## B) Short Answer Questions

1. What do you understand by Vestitive facts and divestitive facts
2. Write the legal personality of Idol and Corporation
3. Write short notes an
   a. Legal personality of unborn persons
   b. Vestitive facts.

# UNIT - 6

# THE ADMINISTRATION OF JUSTICE – LIABILITY – NEGLIGENCE

## INTRODUCTION

A society can exist only under the shelter of the state and the law and justice of the state is a permanent and necessary condition of peace, order and civilization. According to Hobbes, without a common power to keep them all in awe, they are in that condition which is called war: and such a war is as of every man against every man. In such a condition there is no place for industry, no arts, no letters, no society and which is worst for all, continual fear and danger of violent, death and the life of man, solitary, poor, nasty brutish and short. This purpose of maintaining an orderly society is achieved by the state by the administration of justice, through the instrumentality of law. So the administration of justice is defined as the maintenance of right within a political community by means of the state. In this lesson we are going to study about the definition and various method of administration of Justice. Further we are going to discuss the scope of Negligence, Accident and Vicanous liability in this unit.

## OBJECTIVES

After studying the lesson you will be able to understand, the following aspects, -

- The various theories of Punishment
- The Liability and theories of liability
- The scope of Negligence and various theories of Negligence.

## STRUCTURE

6.1. Civil and Criminal Justice system

6.2. Theories of Punishment

(Space for Hints)

6.3. Civil Justice

6.4. Liability

6.5. Theories of Liability

6.5.1. Theory of Remedial liability

6.5.2. Theory of Penal Liablity

6.6 . Classification of Acts

6.7. Negligence

6..8 Theories of Negligence

6.8.1. Subjective Theory of Negligence

6.8.2. Objective theory of Negligence

6.9. Vicarious Liablity

6.10. Summary

6.11. Key Words

6.12. Answer to CYP questions

6.13. Model questions

## 6.1. CIVIL AND CRIMINAL JUSTICE:

The administration of justice is the use of the physical force of the state in the maintenance of the rule of right or justice. For our purpose we can divide justice into two kinds civil and criminal.

| | Civil justice | Criminal Justice |
|---|---|---|
| 1. | Administered in civil courts according to civil law. | Administered in criminal courts according to criminal law. |
| 2. | Object is redressal of the wrong committed civil wrong by | Object is punishment of the wrong doer for the wrong committed. |

(Space for Hints)

| | | |
|---|---|---|
| | compelling wrong compensation or restitution. There is no punishment of the wrong doer. The person wronged gets a benefit from the law, or at least avoids a loss. | |
| 3. | In a civil wrong, the injured person can waive the action | But in crime the person injured cannot prevent proceedings being taken to punish the wrongdoer, for the state controls the procedure and has the power to remit penalty, or to inflict punishment. |

## 6.2. THEORIES OF PUNISHMENT

In Criminal Justice system four theories have been propounded by jurists based on the question whether the purpose of punishment is the desire to make men better, or its purpose is to protect society from certain acts.

**RETRIBUTIVE THEORY :** The offender has outraged the feelings of the community and caused alarm. So he has to suffer bodily pain. In primitive times it may be to make satisfaction to the deity whose laws he has violated and who could be satisfied only by human sacrifices. The community has also to be satisfied. The retributive purpose of punishment was not only to wreak vengeance on the offender so that the emotion of retributive indignation which in all healthy communities is stirred up by injustice may be satisfied, it is also accompanied by the idea of expiation. He must pay his debt to the society for the injury done. This is the first object of punishment to make satisfaction to outraged law. The rule was the lex talionis an eye for an eye a tooth for a tooth.

**Check Your Progress**

1 What are the differences between civil and criminal justice system?

**Salmond observes:** The emotion of retribution indignation both in itself regarding a sympathetic form, is even yet the mainspring of the criminal law. It is to the fact that the punishment of the wrongdoer is at the same time the vengeance of the wronged that the administration of justice owes a great part of

(Space for Hints) its strength and effectiveness. Indignation against injustice is moreover, one of the chief constituents of the moral sense of the community, and positive morality is no less dependent on it than is the law itself. It is good therefore, that such instincts and emotions should be encouraged and strengthened by their satisfaction and in civilized societies this satisfaction is possible in any adequate degree only through the criminal justice of the state.

**DETERRENT THEORY** : The object of punishment according to this theory is to make the civil wrong an example and a warning to all that are like minded with him, so that they are deterred from committing the same by fear of consequences. To achieve this purpose of punishment it becomes necessary more hardened criminal, should be given severe punishment and the penalty of death is justified. The offence is so grave that others have to be deterred from committing similar offences. This type of punishment has no relevance to the wrongdoer. It is punishment not to suit the criminal but the crime but this purpose of punishment has its own drawbacks for even though the object is achieved where the wrongdoer is concerned, yet time and time again it has proved that it does not deter others from committing similar crimes. Just because a convicted murderer is hanged, it has not put an end to murder. There is no decline in serious crimes on the other hand an alarmingly steep rise is seen where crimes of this nature are concerned. Secondly, punishment tends in the direction of cruelty: thirdly, the fear inspired by the most terrifying punishment is bound to create familiarly with it.

Beccaria points out, the more cruel punishment become, the more human minds harden, adjusting themselves like fluids to the level of objects around them, and the ever living force of the passions brings it about that, after a hundred years of cruel punishments, the wheel frightens men only just as first did the punishment of prison. Lastly severer punishment for trivial offences will make the people unwilling to cooperate in carrying out the punishment.

**EXPLAIN THE PREVENTIVE THEORY :** This aspect of punishment is purely accessory to the important one of deterrence. According to it the aim of punishment is the prevention of crime. By disabling the offender temporarily or permanently, by imprisonment or by death penalty, and by striking terror into the

(Space for Hints)

hearts and minds of criminal by painful punishments such as flogging the state seeks to prevent the repetition of crime. Salmond puts it as we hand murderers not merely that we may put into the hearts of other like them the fear of alike fate, but for the same reason for which we kill snake, namely because it is better for us that they should be out of the world than in it. So the purpose of punishment according to the preventive theory is the elimination of the criminal by death, deportation or imprisonment.

**REFORMATIVE THEORY:** Psychological studies and the growth in sensitiveness of the public conscience have evolved the doctrine that the object of punishment should be the reformation of the criminal. According to this theory the personality of the criminal becomes important, as the theory emphasizes the importance of individualizing punishment, the punishment must suit the criminal and not the crime. He is much a patient to be cured by curative forms of treatment, than a criminal to be punished. So imprisonment in a very mild from, open prisons, educational measures, system of probation and parole are advocated. The reformative system of punishment is still in an experimental stage and it is a costly venture and there is always the danger of forgetting that the criminal is an danger both to society and himself and the greater danger is that the society may gradually come to hate less the crime and wrong doing.

It has its own defect when carried too far. Firstly it is too early to determine how an offender will behave when he is related. Unless full time employment is provided for him, poverty and sheer boredom will tend to recidivism. The reformative aspect of punishment will be effective where juvenile and first offenders are concerned, but not the hardened criminal or the habitual criminal. Once prisons become copy homes with all kinds of amenities, there is a tendency to return to them.

Modern criminologist try to strike a compromise between the reformative aspect of punishment and the deterrent punishment. Punishment must be aimed not only to readjust the criminal, but be such as to deter others.

**Check Your Progress**

2 What are defects in Reformative Theory?

## 6.3. CIVIL JUSTICE:

Courts of civil justice enforce both primary and sanctioning rights. As already pointed out in an earlier lesson sanctioning right arises only from the breach of a primary duty.

If I am the owner of a piece of land I have a right in them. You by trespassing upon my land, have committed a breach of your primary duty by violating a primary right. I have a right to obtain damages from you: this is a right in personam and it is a sanctioning or a secondary right and you are obliged to pay damages, which is sanctioning or a secondary duty.

The enforcement of a primary right is called specific enforcement to compel the performance of a contract of repayment of a debt. But sometimes it is impossible to compel the performance of a duty once it is broken or it is not expedient to compel its performance, for example assault or a breach of promise of marriage. In such cases the law enforces only the secondary right of damages

With reference to the purpose of the law in creating them, sanctioning rights may be divided into two kinds they are either 1) the imposition of a pecuniary penalty upon the defendant for the wrong which he has committed or 2) it is to provide compensation for the plaintiff for the harm caused to him by the defendant's wrongdoing. So these sanctioning right are either rights to extract and receive a pecuniary penalty, or a right to extract and receive damages or other pecuniary compensation. The former are penal actions. The latter damages are of two kinds restitution and penal redress. In restitution the defendant is compelled to give up the pecuniary value of some benefit which he has wrongfully obtained at the expense of the plaintiff: for instance in conversion of another's goods he is compelled to pay the value of them or in unjust enrichment he has to account fro all money so obtained. Penal redress is a more important legal remedy than restitution. Here the actual loss suffered has to be made good which may far exceed the profit, if any, which the defendant has gained. So it has two aspects, punishment and compensation for e.g. if I burn my neighbour's house by an act of negligence, I must pay him values he is compensated but I am poorer, so I am punished.

Factors Determining the measure of punishment: In awarding punishment certain factors have to be taken into consideration. They are 1) Motive the more ignoble the motive, the severe should be the punishment i.e., if the crime was committed for profit, or to satisfy violent possession, deterrence should be the object of punishment 2) the magnitude of the offence the greater the harmful consequence or the mischief caused the greater is the punishment 3) the character of the offender the more incorrigible he is severer should be the punishment. Where a first offender or a less vicious law-breaker is concerned the punishment could be to reform him and prevent its repetition.

In civil wrongs the measure of punishment is determined exclusively by the magnitude of the offence, that is the amount of loss inflicted or suffered by it. Punishment is to redress the wrong and make reparation by compensating the damage done.

## 6.4. LIABILITY:

Causing unjustifiable harm gives rise to liability and the wrong doer must do or suffer something because he has already failed in doing what he ought.

Liability is either civil or criminal, it can also be divided into remedial or penal. Criminal liability is always penal, civil is invariably remedial except in those cases where penal liability is enforced e.g. when compensation is granted even when the victim has not suffered any less and the offender has gained no benefit by his wrongdoing, such as spring on a man's face.

## 6.5.THEORIES OF LIABLITY

**6.5.1 The Theory Of Remedial Liability:** The theory may be simply stated as when the law creates as duty, it also enforces the fulfillment of it. But Salmond points out a few cases in which the duties are not specifically enforced.

Imperfect duties such as a statute barred debts (ii) duties which from their nature cannot be enforced, one e.g. libel assault (iii) duties which the law on grounds of policy will not deem advisable to enforce contract to render personal service or the duty to fullfil a promise of marriage.

(Space for Hints)

**6.5.2.The Theory of Penal Liability:** Criminal liability is based on the maxim actus non facit reum nisi mens it rea. So the law requires both the actus the wrongful act and mens rea, the guilty mind. Mens rea or the guilty mind of the wrongdoer is made up of two states of mind of the wrongdoer. They are intention and negligence. So a wrong doer can be guilty of not only an intentional wrong but also of a negligent wrong. So inevitable accident or mistake, the absence of both wrongful intention and of culpable negligence is generally a ground of exemption from penal liability.

**Acts:** Although Salmond's definition of an act is not satisfactory it is sufficient for the purposes of the law. To him an act is any event which is subject to the control of the human will.

A human act contains three elements according to Keeton. 1) There must be the exertion of a person's will volition. This exertion need not always be spontaneous. It may function as a result of compulsion, or unconsciously as in a lunatic 2) The consciousness in the person's mind of the exertion of his will e.g. an infant may not be conscious of it and not be aware of the act he is committing: so too in case of insanity or it may be due to ignorance of law, and 3) the outward manifestation of the exertion of the will.

The circumstances in which the act was done and the consequences of the act are infinite. The material ones are selected by the law for fixing the doer responsibility for them. The principle is that only the proximate cause or direct cause or causa causans is to be taken into account which leaves the chain of causation between the act and the consequences unbroken. The law cannot take into account everything that follows a wrongful act. As the law has no natural boundaries, its limits must be artificially defined for fixing responsibility.

## 6.6. CLASSIFICATION OF ACTS:

**Check Your Progress**

3. What are the various theories of liabilities?

Acts are generally classified as Positive and negative acts: These are the acts of commission and omission.

Internal And External Acts: These are those of the mind and those of the body. Every external act involves an internal acts the converse is not true for an internal act may never realize itself by an overt act.

(Space for Hints)

Intentional and Unintentional acts: in the former there is knowledge and desire of the consequences, while in the latter the act is not the result of a determination of the will, the will was dormant.

Wrongful Acts: These are to which the law attributes harmful consequences, and therefore liability. They may be wrongful either in their tendencies or in their actual results. In criminal law acts, are wrongful on account of their mischievous tendencies. In civil law, because of their actual results. In the former it is sufficient to prove the act itself for liability, even though no harm has resulted e.g. attempts, whereas, in the latter there must be proof of actual damage for cause of action e.g. slander, breach of contract.

But it is not as if all damage is wrongful. Such wrongful act, fall under damnum sine injuria, rival shops or schools. One shop owner cannot sue another for injury as the harm done to the individual is gain to the society at large, or it falls within his rights.

**Mens Rea:** Mensrea assumes two distinct forms, namely, wrongful intention or culpable negligence. The wrongdoer neither have done the wrongful act on purpose that is intentional or done it carelessly. In both cases he is held responsible for his act.

There is an increasing number of wrongs where mens rea is not required. Some jurists have began to speak of eclipse of mens rea. The first class are wrongs of strict liability and the second class are wrongs to which are attached criminal sanctions but which involve no moral stigma, breaches of traffic rules, such as riding doubles on a cycle or without a light at night or gay walking etc.

**Intention And Negligence:** The desire of consequence is termed intention. Intention is the purpose or design with which an act is done and the laws make a man responsible for the consequences of certain acts, just because he foresaw them. So a man is responsible for all the intended consequences of his act, To Holmes intent is made up of two factors foresight that certain consequences will follow from an act, and wish for those consequences working as a motive which includes the act. To Austin intentions is 1) An advertence of the consequences 2) A desire that it shall happen 3) A belief that the contemplated act (or forbearance) will bring it about; or atleast an indifference as

**Check Your Progress**

4 What is meant by Mensrea?

(Space for Hints)

to whether it will or will not follow from the act or (forbearance). The third to some jurists is only a kind of negligence. For them an act is wholly intentional when every part of it was foreseen and desired, and wholly unintentional when no part of it was foreseen or desired, or was it the outcome of any conscious purpose or design. To illustrate, a man driving a car applies the breaks in order to stop the car. His act is intentional as to the consequences, but the car skids and knocks down a child, his act is unintentional as to this consequences as there is lack of both foresight and desire. So his act is wholly unintentional.

To Salmond, any wrong which is intended only in part, must be classed as unintended. If a intentionally upsets a glass of water he will not be allowed to maintain that he did not intend to spill the contents beneath. The burning of a house will be held to be with intent to injure the possessor for that was the inevitable result of such an action. So all those cases where inevitable consequences may as a matter of common sense imply both foresight and desire a person may be held to have intended them and be dealt with accordingly. So intention does not necessarily involve expectation. As Salmond puts it intention is the foresight of desired issue however improbable nor the foresight of an undesired issue, however probable.

Conversely, expectation does not in itself amount an intention. A doctor performs an operation well aware it may cause the death of the patient, but his desire is to cure, and therefore cannot be held to have intentionally killed him if in fact the patient dies. So in view of this and many other cases the statements everyman is presumed to intend the natural and probable consequences of his act is misleading for, foresight of the consequences does not necessarily imply desire. In all willful wrongdoing a man is presumed to have intended not only the consequences, but also presumed to have intended the means by which these consequences are obtained. If A kills B in order to rob him A is said to have desired and intended the death of B even though A regrets the necessity of it.

Both in English Law and Indian law, the intention need not be specific. A shoots at B to kill him, but instead kills C. This is murder of C. He is held guilty of willful murder under the doctrine of transferred malice which applies only where the harm intended is the same as the harm done.

(Space for Hints)

Intention and Motive. An act whether rightful or wrongful is seldom intended and desired.for its own sake. The act and the consequences are intended because the actor hopes to obtain some advantage for himself i.e., with an ulterior object in view. This ulterior intent is the motive, that which moves a person to a particular course of conduct. The immediate intent or intention is that the harmful consequences are intended and desired for its own.

The law ignores motive in civil cases; in criminal cases, motive serves in some cases as inference of guilt; but civil motive is not essential to liability, for a lawful act does not become unlawful when done with bad motive, such as ill will, nor is an unlawful be excused because it is done with the best of motives. Both A and B commit murder; A to save the community from a tyrant, B to rob the victim. But both are held guilty of murder. A good motive is no defence. It may mitigate the punishment. When a man is within his rights, motive good or bad is not considered.

**Malice:** The term is used in different senses: 1) It may simply mean an intention to inflict harm, as such it is a necessary element in every crime 2) In statutory wrongs of malice: It signifies intention to cause a particular type of harm, prohibited by the statute or a recklessness. Whether such harm ensures or not e.g. malicious damages to property under the Malicious Damages Act 1861 3) in cases of murder it will be one of the several forms of mens rea necessary to constitute the crime. This is malice a forethought or murderous motive: this is merely an intent to kill or hurt grievously 4) It may mean improper motive as in malicious prosecution 5) it amounts to wrongful motive spite or ill will against a defence of qualified privilege in defamation, to use the privilege for some purpose other than for which the law allows it 6) Under the rule militia supplet actatem (malice makes up for age) malice means the act was done with the knowledge of its nature. Under 7 years a child is presumed to be doli incapax but this presumption can be rebutted by the above rule, provided it is not conclusive presumption.

Fraudulent acts must be distinguished from malicious acts. To steal property is fraudulent to damage or destroy it is malicious. In the former the

 motive is gain. But in the latter the motive is the pleasure of a another, rather than gain to the wrongdoer.

Relevance And Irrelevance Of Motive. Generally motive is The law takes note of what a man does, not why he does it. Lord Hercl leading case of Allen v Food (1989) A.C. observed, it is certainly a gen of our law that an act prima facie lawful is not unlawful and action account of the motives which dictated. In corporation of Bradford v pici case already referred to, it was held non use of property which would be leg done with a proper motive can become illegal because it is promoted by a mot which is improper or even malicious.

There are a few exceptions to this general rule that motive is immaterial.

In civil law there are few statutory offences in which malice has to be proved, such as malicious damage to property, malicious prosecution, ii) motive become important as evidencing a state of mind of the doer of the act. For examples, if A kills B and sets up a plea of self defence, motive is essential to consider whether the real motive was to save his own life or take a cruel revenge upon the man whom he found in his power. Forgery is the making of a false document with intent to defraud. Here the ulterior intent is the source of the mischeievous tendency of the act, so it is material.

The law punishes attempt as well. Every attempt is an act done with intent to commit the offence so attempted. The existence of this ulterior intention or motive is of the essence of the attempt.

In all the cases of criminal attempt motive is important for it is the motive which gives the act all its mischievious tendency and therefore its wrongful nature and the actor is punished, because his motive was the commission of the crime.

An act to be regarded as a criminal attempt the purpose must manifest itself, that is to say must bear criminality on the face of it. Res ipsa loquitur, then and then alone is the act sufficiently proximate i.e., so closely linked with the crime contemplated that the crime would have been committed had not the chain of causation been severed.

(Space for Hints)

**The Four Stages of a Crime:** Every intentional crime involves four distinct stages, intention, preparation, attempt and completion.

The first two stages, intention and preparation are innocent for an unacted intention is no more a ground of liability than an unintended act. Preparation is also commonly innocent. A buys a pistol to kill B. if he does not proceed further in the accomplishment of the crime, he remains free from legal guilt. There is still a locus penitential for the preparation does not be itself reveal that the object was to commit a crime. In queen empress v. Ramakala (IL RI madras 5) an accused who intended to commit suicide was stopped before she reached the well. It was held that she could not be convicted for attempt to commit suicide as her action amounted only to preparation and not an attempt to commit since she had a locus poenitentiae and could have changed her mind before reaching the well. The Indian Penal Code, of course provides that preparation to commit dacoity and waging war against the state or king are punishable of fences. These are the exceptions.

Attempts and completion are grounds of criminal liability. It is only by looking at the circumstances and the motive behind the act that the law has to establish that the accused did intend to commit a crime. If A points a gun at B and pulls the trigger, but the bullet misses B the very act bear criminality upon its face. A pickpocket tries to pick an empty pocket, nonetheless he is guilty of an attempt.

**Jus Necessitates:** That necessity knows no law, is one of the exceptions to the maxim actus non facit reum nisi mens it rea. It is said that an act which is necessary is not wrongful even thought it is done with full and deliberate intention. Necessity in this context means the presence of some motive adverse to the law, and of such exceeding strength as to overcome any fear that, can be inspired by threat of legal penalties. Where two drowning men clinging to a single plank able to support only one the law recognizes the right of each one to use his strength for his own preservation. But in Rev Duley (1934) I4Q BD 273; necessity was held not a ground of excuse, where several are ship wrecked and one kills the other to feed on the flesh for preserving their own lives, it will be murder. So jus necessitates is a relevant consideration in determining the measure of liability though not to secure complete immunity from liability.

**Check Your Progress**

5. What are the four stages of a crime?

As a the right of private defense, where property is concerned the law allows a person to pull down a neighbouring house to prevent the spread of fire to his house or the house of others.

As to the right of private defence of person both English law and Indian law (secs 96 to 106 of the Indian Penal Code) provide that if in the case where he apprehends death and defender has to run the risk of injuring the third person, his right of private defence extends to the running of that risk. Secs. 97, 99 and 106 of the Indian Penal Code lay the conditions under which the right can be exercised:

If no recourse to pubic authority is possible ii) that the act done stops short of defence and does not amount to offence iii) that the person doing the act did not provoke the other party against whom his right is claimed.

A second type of necessity is the duty of obeying existing laws. This often furnishes an excuse for an act which otherwise would be culpable act done because of mistake of fact, believing in good faith that he is bound by the law to do it. (Secs. 77 to 79 of the Indian Penal code).

The third case is the necessity of the act of a stranger. This plea is restricted by sec 94 of the Indian Penal code. Sec 94 provides. Except for murder and offences against the state punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, at the time of doing it reasonably causes the apprehension that instant death to that person will otherwise be the consequence but moral force of other is no excuse for a crime.

This plea is difficult to prove and so in most cases it is regarded as relevant to the measures of punishment rather than a ground of exemption from liability it certainly does mitigate punishment.

## 6.7. NEGLIGENCE

Negligence is also blameworthy conduct. As already pointed out a person is liable not only for an intentional wrong, but also for culpable negligence. Behavior is said to be wrong in two respects 1. When the doer does not conduct himself in doing the act as a reasonable and prudent man would under similar circumstances and 2. It is negligent in regard to some person or thing. So a

negligent person is one who has no regard which an ordinary prudent man would have for the welfare of his fellow citizens, and he causes the harm not because he desires it but because he is indifferent. So to Salmond there are two kinds of negligence. The advertent form and the inadvertent form. In the former there is fore knowledge and in the latter no fore knowledge, but as there is no desire of the consequences they are only form of negligence. In advertent negligence, in spite of fore knowledge the doer does the act and cause the harm, according to Salmond, is only because he is too indifferent of the welfare of his fellowmen. So the essence of negligence is not inadvertence but indifference. It is such conduct which produces harm not because of the wrong doer, was inadvertent to the consequences of the act, but because he was too indifferent to consider the consequences.

Austin defines negligence as a breach by omission of a positive duty. The duty is broken only because of thoughtlessness, which produce inadvertence to such a degree that the actor did not even know that what he was doing was wrong. So negligence is inadvertence of the act itself, let alone, of the consequences. This state of mind alone constitutes negligence. This is simple and pure negligence, the inadvertent negligence of Salmond. So the essence of negligence to Austin is not indifference but thoughtlessness.

Salmond's advertent form of negligence is divided by Austin into heedlessness, rashness and recklessness.

In heedlessness, there is advertence of the act but not its consequences. In rashness there is advertence of both the act and the consequences but assumes on sufficient ground they will not follow. In recklessness there is advertence of both the act and its consequences. All these three states of mind are different forms of intention. But so Salmond as in none of them there is desire, and in spite of advertence the doer does the act only because he done not sufficiently desire to avoid the consequences, all these states of mind are forms of advertent negligence.

**Duty to take care:** According to Professor Winfield tortuous liability arises from the breach of a duty primarily fixed by the law, his duty is towards person generally and its breach is re dressible by an action for un liquidated

(Space for Hints)

damages. So the question is there is a legal duty to take care, and is this duty towards the plaintiff? There are two answers to this question. To Winfield: a man is bound to exercise due care or rather, omits or falls short of it at his period namely, of being liable to make good whatever harm may be to the point that there is a legal duty to take care but it is not enforceable in any way. Supposing a man drives carelessly an action for damages will lie. So the right thing is the right to freedom from harm.

Salmond's view is the better of the two. He says in general we may say that whenever an act would be civil wrong if done intentionally it is also civil wrong if done negligently. When there is a legal duty not to do a thing on purpose there is commonly legal duty to take care not to do it accidentally. To this statement there are a few exceptions; there is a duty not to deceive another, but unless there is an obligation he is not responsible for false statements which he makes honestly believing them to be true, even if he is negligent in making them; the duty of owners of premises to prevent the premises from being a source of danger to those upon the highway or to negihbours etc.

It is clear that no general principle can be laid down as to be existence of this duty.

**The standard of care:** Negligence may exist in varying degrees. In Roman law: there were three kinds of negligence Culpa-failure to show that type of care which a good father would show, 2) Culpa-lata-failure to sue any reasonable care at all, and 3) **Culpa laves in concerto** failure to show ordinary diligence or that amount of care which he would ordinarily show in his own affairs. So we too have tried to distinguish between gross ordinary and slight negligence. But these distinguish between civil and criminal liability.

In criminal law negligence must be so gross to render a person liable for neglect of duty such as in manslaughter. Simple lack of the act which may suffice for a civil wrong will not be enough for purposes of criminal law.

Civil law on the other hand applies the test of the reasonable man. It is a difficult test. To drive fifty miles in the heart of the city is criminal, but his conduct will be reasonable if it is on a deserted country road. So to determine this standard of care of the reasonable man three things have to be taken into

consideration 1) the magnitude of the risk to which people are exposed. 2) the importance of the end to be achieved and 3) the inconvenience and cost of avoiding the risk. By running the trains only at 10 miles an hour many fatal accidents could be avoided, but this additional safety would be attained at too great a cost of public convenience. So when the trains are increasingly speeded up it does not amount to failure to take reasonable care, that of a reasonable man and are not guilty of negligence.

Whether there has been a failure to take the necessary precautions have to be ascertained from the circumstances of each case and the rule to be applied is res ipsa loquiter. When two trains belonging to the same company collide, the very fact that they belong to the same company and the fact of collision raises the presumption of negligence, for railway train, proper controlled do not run into one another. Britama Hygienic Laundry Co, V. Thorneycroft (1925) defined the rule where you have the subject matter entirely under the control of one party, and something happens while it is under the control of that party which would not in the ordinary course of things happen without negligence, you may presume negligence from the mere fact that it happens, because such a thing could not happen without negligence.

## 6.8. THEORIES OF NEGLIGENCE:

The theories of negligence revolve around the question whether negligence is a state of mind or it is a state of the body i.e. a particular type of conduct? It is a subjective fact? Or an objective fact? Two rival theories have, therefore, been propounded by jurists. These are called, the Subjective theory and the objectives theory of negligence. According to the former negligence is a state of mind and according to the latter negligence is not a state of mind but a particular type of conduct.

**6.8.1. The Subjective Theory Of Negligence:** To Salmond a careless person is a person who does not care. It means that a negligent person is one who does the act not because he is inadvertent but only because he is too indifferent to the welfare of his fellowmen. He may be advertent, nevertheless he is negligent only because he is indifferent. It is not correct to say that just because indifference may produce thoughtlessness or inadvertence that they are the same,

(Space for Hints) for thoughtlessness and inadvertence may not always be due to indifference. A person may be careless and not reflect upon his act and its consequences this is inadvertence due to carelessness. But again he may reflect upon his act and its consequences; yet do it as he does not sufficiently desire to avoid the consequences. Here he is advertent yet careless. There may yet be a third case where the person has diligently tried to ascertain the nature of his act and consequences but failed to do so; here he is inadvertent but not careless. All these cases will show you that he has been guilty of a negligent act not because he was inadvertent but only because he was careless or indifferent. So to Salmond, the essence of negligence is not inadvertence which may or may not result in advertence. So he defines negligence as the mental attitude of under indifference with respect to one's conduct and its consequences.

Austin is also a supporter of the theory negligence is a state of mind, a subjective fact but he differs from Salmond as to what exactly constitutes negligence.

To Austin negligence is the positive of intention. As intention consists inadvertence to concomitants and the consequences of a given act negligence is want of advertence which ones duty would naturally suggest. So as already pointed out Salmond's inadvertent negligence, negligence pure and simple, alone would be negligence of Austin. Intention is a state of mind so negligence its opposite is also a state of mind.

**6.8.2. The Objective Theory Of Negligence:** The question here is, is negligence a state of body or a particular type of conduct? Negligence consist in pursing a conduct different from the conduct of a reasonable and prudent man.

Clark and Lindsell are two of the great jurists who support this theory. They say that the law has imposed on each one of us the duty to take care and negligence is the omission to take such care as under the circumstances it is the legal duty of a person to take care. To take care is as much an objective fact as taking a glass of water. Negligence they say is contrary to diligence and no one describes diligence as a state of mind.

Salmond does not concur with this view. He points out that although negligence invariably results in a failure to take precautions that a reasonable

person would in the circumstance, yet the failure to take necessary precautions does not, however point to negligence. This failure to take necessary precautions may be even intentional or accidental. Poison may be left unlabeled and a person drinks it thinking it is medicine and dies. Externally and objectively viewed there is a failure to take necessary precautions which the law insists should be taken where poison is concerned. Superficially it may look like negligence, it can be even intentional where the bottle was left unlabeled to cause the death of a person, or failure to take precautions may be even accidental as in the case of mistake in the contents of the bottle. Externally and objectively in every case there is a failure to take the necessary precautions; but it is only when you look at the state of mind of the doer of the act, his mental attitude towards the act and its consequences. We can characterize the act as either negligent or intentional or accidental. So negligence is not and objective fact but a subjective fact, a state of mind.

Reconciliation of the two theories: Both theories are correct if we remember the word negligence had two meaning and each meaning supports one theory.

Contrasted to intention, negligence is a state mind. It is only, when we look at the state of mind we can distinguish between a negligent wrong an intentional wrong.

Negligence can be contrasted to inevitable accident. Here the state of mind is not relevant but only the conduct of the doer whether or not it was that of a reasonable and prudent man.

**Absolute and Strict Liability:** The principle of strict liability laid down in Rylands V. Fletcher was all important in a modern civilized world which had to meet a variety of changing social problems in a fast changing world. The harshness of this rule is mitigated and to balance the conflicting social interests more in favour of the community the new idea has been evolved by courts that loss should be spread on those who are best able to bear it.

**Wrongs of strict liability:** Wrongs of strict liability and exceptions to the maxim actus non facit reum nisi mens it rea Or in other words, a man is made

(Space for Hints)

responsible for the damage caused to another, but not trough the intentional or negligent act of the person so made liable. So the rule of mens rea is inapplicable.

**The rule is:** If a person brings on his land anything which is likely to do mischief if it escapes he will be prima facie answerable for the damage caused by its escape even though he had not been negligent. The rule is applicable not only when there has been a collection of water, it applies to gas, electricity, vibrations, yew trees, sewage, explosive, noxious fumes and rusty wire. For the rule to apply there must be escape and non natural use of land.

In modern criminal law the only instances of strict liability that exist are cases where a statute specially prohibits certain acts in the interest of the public. Thus section 154 of the Indian Penal Code has provided that an owner or occupier of land on which an unlawful assembly is held, is fined although such owner was ignorant of the act, but where the agent or manager was not. English law has three instances of strict liability 1) keeping two or more lunatics 2) Selling intoxicating liquor to a drunken person though the ventor did not know he was drunk and 3) innocent sale of adulterated food.

Strict liability being too wide, has been narrowed down by certain rules. They are mistake of fact and accident.

**Mistake of Law:** Ignorantia juris non excusat: Ignorance of law is no excuse is a maxim not only of English law but of other systems of law. The rule is justified on the ground that every man must be taken to be cognizance of the law, for otherwise the excuse of ignorance may be carried too for and result in the miscarriage of justice and thus paralyse the administration of justice. This rule is absolute, and the presumption irrebutable.

The reasons given for this strict rule are a) As the law is definite and knowable, everyone is presumed to be cognizable of the law at least of that part which concerns him. So ignorance of law, is impossible b) Evidential difficulties in establishing a wrong doer's ignorance c) The ordinary law of the land, is by and large based upon common sense and principles of natural justice. So the wrongdoer where he breaks a legal rule should know he is violating a rule of right.

(Space for Hints)

**Mistake Of Fact:** Ignorantia facti excusat applies in criminal law. Where a man intending to do a lawful act, does that which is unlawful, the exemption from liability is only as to mistake of fact and not to mistake of law, for instance, a man intending to kill a burglar under circumstances which would justify him in so doing, by mistake kills one of his own family member, this is no criminal act.

In the sphere of civil law, absolute or strict liability is the general rule. The *rule is so far as civil liability is concerned a general principle* or our law that he who intentionally or unintentionally interferes with the person, or property, reputations, or other rightful interest of another does so at his peril, and will not be heard to allege that he believed in good faith and no reasonable grounds in the existence of some circumstances which justified his act.

There is one exception to this maxim in criminal law. If a person abducts a girl under the legal of consent, inevitable mistakes as to her age is no defence. This is because the act of taking the girl away was itself wrong. Rv. Prince.

**Accident:** Inevitable accident is commonly recognized, as a ground of exemption from liability, for the reason there is no volition whatever in respect of the event which causes damage.

Where culpable accident is concerned it is no defence for such accident is due to negligence, but inevitable accident is a defence for the avoidance of the consequences which would have required a degree of care or above the standard of care required by the law. The question is how far the accident could have been avoided by reasonable care. If it could have been avoided then the defendant would be held liable. Otherwise, it is regarded as inevitable and the defendant excused. In Hammock v. While, 2 the defendant horse become suddenly restive, it bolted and killed the deceased. In a suit by his widow for damages, Early, C. J. and Wills J. held that in the absence of evidence of any want of skill in the defendant and in the absence of any evidence to show there was a culpable want of prudence on his part in taking the horse out, the defendant should not be liable.

Inevitable accident as a ground of defence will not be available to the defendant for the acts of his animals and escape of dangerous substances kept by him in his premises when the escape was not due to his negligence.

(Space for Hints)

As far as domestic animals are concerned a man is responsible for trespass and damages to the property of others, unless he shows that inspite of his diligence and care, the trespass or damage was due to an act of God or Vis major or act of third party. As for animals fare nature, he is under an absolute liability for all damage they do. 1

Acts of God, acts of strangers, accumulations ordered by statue, may be availed as defences, so long as there is no negligence on the part of the defendant.

## 6.9. VICARIOUS LIABILITY:

The liability of a master for the wrongful acts of his servants, the liability of hospitals towards their patient are examples of vicarious liability. The principle is that a man must show the responsibilities for harm that occur in the conduct of his business and that the servant does the business by the master's express or implied authority. It is an extension of the principle, qui facit per allam facit per se, which is reduced to that of respondent superior which means, he who does a thing by the instrumentality of another is considered as if he h ad acted in his own person and to the act of a servant are the acts of the master for which he may be justly held responsible. The liability is however limited in favour of the employer by in the course of employment rule.

Another chief class of vicarious liability recognized by civil law apart from the class is the representatives of a dead man are liable for the misdeeds done by him when alive. The old law was stated in the maxim action personal is moritur cum persona i.e., a personal action dies, with the person. Now statutory provisions had abolished the old law. The argument is that as a creditor should not lose his right to recover what is due to him just because the debtor dies so too use of the physical force of the state in the maintenance of the rule of right or justice. For our purpose we can divide justice into two kinds civil and criminal. The theories regarding Criminal Justice system, and Civil Justice system is separately the injured should not lose his right to be compensated for his injuries because the wrongdoer dies, the estate of the decreased wrongdoer is answerable.

**Check Your Progress**

6. Define Vicarious Liability.

In criminal law vicarious liability is rare. The master is responsible for the acts of the servant even criminally, if the work entrusted to the servant was of a dangerous type and the master himself was criminally, negligent. A master can be criminally, liable for the acts of his servant when the statute imposes such vicarious liability, for example, under the adulteration of foods act and so on. In R.V. Stephens where a master was made criminally liable for the public nuisance committed by his servant. Blackburn J observed All that is necessary to say is that where a person maintains works by his capital, and employs servants, and so carries on the works as in fact to cause nuisance to a private right them an action would lie if the same nuisance inflicts upon a public right the remedy for which would be indictment, the evidence which would maintain the action would also support the indictment. If a person authorizes another beforehand to commit a wrong he is justly held liable according to the doctrine of prior authority.

## 6.10. SUMMARY

The administration of justice is defined as the maintenance of right within a political community by means of the state. This purpose of maintaining an orderly society is achieved by the state by the administration of justice, through the instrumentality of law. The administration of justice is the discussed under various heading. Further Liability, Negligence also discussed in detail.

## 6.11. KEY WORDS

Negligence - Carelessness

Liability - An obligation

## 6.12. ANSWER TO CYP QUESTIONS

For Question No. 1 - Refer section 6.1

For Question No. 2 - Refer section 6.2

For Question No. 3 - Refer section 6.6

For Question No. 4 - Refer section 6.6

For Question No. 5 - Refer section 6.9

(Space for Hints)

## 6.13 MODEL QUESTIONS

**(A) Long answer Questions**

1. State the importance of administration of justice. Distinguish between civil and criminal administration of justice.
2. Discuss Salmond's analysis of intention and distinguish it from motive.
3. Examine in detail the different theories of punishment?
4. Discuss the relative merits of administration of justice by fixed principles and administration of justice by discretion.

**(B) Short Answer Questions**

1. Write a note on the following
   a) Vicarious Liability
   b) Mistake of fact
2. What are the four stage of crime?
3. What is the difference between Intention and motive?

# UNIT - 7

# OWNERSHIP

## INTRODUCTION

Ownership denotes the relation between a person and an object forming the subject matter of ownership. It consists in a complex of rights all of which are rights in arm being good against all the world and not merely against specific persons. Analytically the idea of ownership consists of an innumerable number of claims, privileges, powers and immunities with regard to the thing owned. Jurists have tried to define ownership with exactitude. But failed, because it is not so easy to define it.. Various authors defined the ownership in different way. In this lesson we are going to study about ownership in detail.

## OBJECTIVES

In this lesson we are going, -

- To know about characteristics and kinds of ownership.
- To know about possession, concept of possession and modes of acquiring possession.
- To learn about possessory remedies .

## STRUCTURE

7.1. Definitions

7.2. Characterstic of ownership

7.3. Kinds of ownership

7.4. Possession

7.5. Concept of possession

7.6. Modes of Acquiring possession

7.7. Possessory Remedies

(Space for Hints)

7.8. Justification of Possessory Remedies

7.9. Summary

7.10. Key words

7.11. Answer to CYP answers

7.12. Model Questions

## 7.1. DEFINITIONS

**Salmond :** Salmond has defined ownership as follows ownership in a material thing is the general, permanent and inheritable right to the uses of that thing. To Salmond the right of ownership is not a single right, it being a bundle of rights, liberties, powers and immunities.

**Holland defines** it as a plenary control over an object. No such plenary control over a thing is possible nowadays as the control is limited and restricted by the law in diverse ways for the welfare of the community.

**Austin** : He defines ownership is a right indefinite in point of user, unrestricted in point of disposition and unlimited in point of duration over a determinate thing.

Let as analyse Austin's definition of ownership and see whether it holds good under modern conditions.

**a)** ***Indefinite in point of user:*** The right of ownership is an absolute right, i.e. a right which confers absolute power on the owner to do as he pleased with the subject matter of ownership.

This statement however is not true because rights of ownership may be limited by adverse rights of encumbrances

or by the right of the possessor like lessee. Secondly it may be restricted by special provisions of law and thirdly it may be restricted by general duties under which the use of property is restricted to legitimate functions.

**Check Your Progress**

1. How Austin defined ownership?

**b)** ***Unrestricted in point of disposition:*** According to Austin the right of ownership is unrestricted i.e. the owner has absolute freedom to dispose of the

(Space for Hints)

property as he pleased. However this rights is qualified under the following circumstance i) a minor or a lunatic can own properties but be cannot alienate them ii) Hindu joint family can own property but the kartha can alienate it only for legal necessity.

c) ***Unlimited in point of duration:*** The right of ownership exists forever. This statement again is qualified by the following circumstance as where a person becomes Insolvent or where the property which is the subject matter or ownership is compulsorily acquired by the government.

So we find all the three ingredients of Austinian definition of ownership are not applicable to the modern idea of ownership. In the first place there have been increasing restrictions both common law and statutory on the abuse of privileges contained in ownership. Secondly there has been curtailment of the profit element. Legislative control now exists as to profits, interests and rents. Thirdly several methods have been devised for controlling the power of ownership.

## 7.2. CHARACTERISTICS OF OWNERSHIP:

1. Ownership is incorporeal.

2. Ownership can only vest in a person (person in the eye of law). It denotes the relation between a person and a thing when all the rights in relation to that thing are vested in him.

3. It is not a mere relation between a person and a thing. It is a relation between a person, a thing and another person or other persons. The concept of ownership can hardly arise if a man were to live by himself on a desert or Island. It is only in relation to others the idea become necessary to distinguish between things that are his, and those that are not his. It is only then a person can say this is mine, that is yours.

4. This right of ownership is a comprehensive right and so when we say a person is the owner of a thing we think of him as having a comprehensive right over it, though that right is made up of a large number of particular rights. Supposing I am the owner of an estate,

**Check Your Progress**

2. What are the characteristics of ownership?

(Space for Hints)

the particular rights I have as owner are too many to be enumerated here. I mention a few here the right to possess, the right to enjoy the fruits, flowers etc, the right to walk across it, the right to dispose, it, the right to misuse it etc. So we think of an owner as having a single comprehensive right over it and not in terms of the particular rights he has over it. All the various rights are conceived merged in one general right of ownership.

5. Although an owner can separate all the particular rights from his general right of ownership and grant them to others by way of encumbrances, and even to such an extent that he derives no immediate benefits retaining for himself but the shell of ownership or the nude properties or the nudism jus it is still ownership, for it is a right which outlives all the other rights, which are limited rights of use and enjoyment granted temporarily to others by way of encumbrances. His right of ownership even when it is only the *nudum jus* is a magnetic core attracting to itself the rights convey to other and when they are surrendered they merge once more to become the comprehensive right of ownership. So Salmond says, he then is the owner of material object who has a right to the general and residuary uses of it, after the deduction of all special and limited rights of use vested by way of encumbrances in other persons.

## 7.3. KINDS OF OWNERSHIP

**Corporeal And Incorporeal Ownership:** As ownership is only a relationship between a person and the thing, ownership is only a right. It exists *de jure* but not *de facto*: so ownership is always incorporeal. The prime subject matter of ownership consists of material objects such as land and chattels. But ownership is by no means limited to things of this category. A man's wealth may consists not only of his land and goods but of such thing as interests in the land of others, debts due to him, shares in companies patents, copyrights etc. Salmond indeed took the view that ownership, in its most comprehensive signification denotes the relation between a person and any right that is vested in him. Ownership therefore is incorporeal.

> **Check Your Progress**
>
> 3. What is meant by vested ownership?
> 4. What is meant by Co-ownership?

(Space for Hints)

Whether the right exists in respect of a material thing or an immaterial thing, we still the speak of corporeal ownership and incorporeal ownership. I may own land or it may be a leasehold right, or the goodwill of a firm for convenience the first is called corporeal ownership and the second and third incorporeal ownership. The only purpose this distinction serves is to show whether the right exists in respect of a corporeal thing or incorporeal thing. But remember, the right of ownership is only a right and therefore only incorporeal.

**Ownership is either Sole Ownership or Concurrent**

i.e., duplicate ownership. In the former one person owns the thing in the latter two or more persons own the thing at the same time.

English law recognizes four chief kinds of duplicate or concurrent ownership, they are i) Co-ownership ii) trust and beneficial ownership; iii) Legal and equitable ownership; and iv) Vested and contingent ownership.

**7.3.1. Co-ownership:** Before explaining the different kinds of co-ownership let me explain the principle underlying this type of duplicate ownership and how it arises.

Supposing A and B together buy a house. No fraction of the house belongs to either, but both together own the whole. 'A' has a right to the entire house and at the same time 'B' has a right to the entire house. The right of ownership over the entire house as an undivided unity is vested in both A & B at the same time. This is co-ownership. Once they begin to own a definite share in the house, their claim become adverse, then co-ownership is dissolved into sole ownership by the operation of what is known as partition.

The law recognize two kind of co-ownership. Whether it is the one or the other form will depend upon the legal incidents attached to it by the law this is usually the effects of death of one of the co-owner has devolve upon the title of the other. The two instances of co ownership are joint ownership or joint tenancy and ownership in common or tenancy in common.

**Illustrations:** Supposing a grant of land say ten acres is made to AB, B, & C without indicating that how they are to take separate interests in the ten acres. In a grant of this nature each has an identical right in the ten acres. A right

(Space for Hints)

is identical to the rights of B and C to put it in a nutshell each has a right not only to the land. This is an instance of joint ownership. None of them can claim ownership over any distinct share. The effect of this is when one co owner dies, his interest accrues to the survivor by the right of survivorship of *jus acresscendi*.

But if the grant specified the definite shares of the co-owners, then it is not joint ownership in common. Each is interested only in a part and not in the whole. So when one co-owner dies his right to definite share descends to his successors like any other inheritable right.

**7.3.2. Trust and Beneficial Ownership:** In England trusteeship gives rise to concurrent or duplicate ownership. In this type of duplicate ownership two persons own the property at the same time. One of the trustee (or trustees) who is the owner in the eye of the law and so the legal owner and the other is beneficiary (or beneficiaries) who is the owner in the eye of equity but not in law, and whose ownership is therefore beneficial ownership.

The ownership of the trustee is a bare legal ownership; it is nominal rather than real as the trustee has no right to the beneficial enjoyment of the trust property, which he holds solely for the benefit of the beneficiary. The beneficial ownership is always enforceable against the trustee, and all those deriving their title through him, and all those who had or ought to have notice of the trust.

Trusteeship may be created for the benefit of four classes of persons; i) in favour of unborn persons i.e. creation of future estates by way of trusts. Property cannot be given to such persons directly. So it is vested in a trustee or trustees to be held of such persons. Then the property becomes vested in those unborn persons as and when they come into existence 2) for incapacitated persons, such as infants lunatics, feebleminded persons. These people have to be protected, so these protective trusts are created for them 3) for a body of fluctuating persons e.g. a student body of a particular college or university. No property can be given to such a group, as it is a fluctuating group of persons, so property is vested in the administrator general for the benefit of the students of that college or university 4) when several person have conflicting interests in the same property to safeguard the interests of each of those persons. The property may be vested in

(Space for Hints)

trustee to enable a settlement of family property. Apart from these persons and purposes the problem of endowment and gifts for charitable and religious purposes is made easy for the property may be vested in trustee for such purpose as the settler desires. Today the trust has become an instrument of high capitalism.

Under Indian law trust is not an instance of duplicate ownership. There is only one owner where trust property is concerned and he is the trustee, the legal owner. So the Trust Act does not use the term beneficial owner, but in idea is the same. Trust ownership is ownership coupled with an obligation. It is this obligation, to own the property for the sole benefit of the beneficiary, that safeguards the right of the beneficiary.

**7.3.3. Legal and Equitable Ownership :** Again it is English law that recognizes two kinds of ownership, legal ownership recognized by common law and equitable ownership by equity. Equitable ownership always implied legal ownership, while the converse need not be always true. Common law recognizes only one kind of ownership viz., legal ownership, but equity which is based on good faith and good conscience looked into the intention of the parties concerned and gives to certain persons what is called equitable ownership. One person may be the legal and another equitable owner of the same thing or the same right at the same time legal ownership is that which has its origin in the rules of common law. While equitable ownership is that which proceeds from the rules of equity divergent from the common law. The courts of common law in England refused to recognise equitable ownership, but the former was treated as trustee for the latter. Chancery indicated the prior claims of equity not be denying the existence of the legal owner, but by taking for him by means of a trust the beneficial enjoyment of his property. The fusion of law and Equity in England in 1873 has not abolished this distinction; it has simply extended the doctrines of equity to the courts of common law. To illustrate this.

If A has entered into an agreement with B for the purchase of Bs land, and has paid a sum of Rs. 1000/- as advance promising to pay the balance of the purchase price on a stipulated day and B promises that. When A had done all he ought to do to execute a deed of conveyance conveying the legal ownership of the land in favour of A, then under English law though B is still the legal owner,

**Check Your Progress**

5. Explain legal and Equitable Ownership.

(Space for Hints)

equity gives to A the legal ownership of the land. In case B commits a breach of the contact, in law the only remedy for A is a money decree and damages for breach of the contract for in law the agreement for sale is nothing more than a contract. But in equity which considers that to have been done which ought to have been done would grant to A as against B the specific performance of the contract. Equity does not deny the existence of the legal owner, only treats him as a trustee for the equitable owner, hence the remedy of specific performance.

**Vested and Contingent Ownership:** In earlier lessons it has been pointed out that every right must have a title, because the title is the source of the right. So **when the title is perfect**, that is to say all the events necessary have occurred then the right is also perfect. Such a right vests in its owner absolutely. This is vested ownership. But when there are rights vests in its owner absolutely. This is **vested ownership**. But when there are certain facts to occur which may or may not happen then the title is imperfect or incomplete, in which case the rights is imperfect. The right is vested in its owner merely conditionally. This is contingent ownership. But contingent ownership is capable of becoming vested or being absolutely destroyed on the happening or non happening of certain facts or events.

**7.3.4. Kinds of Vested Ownership:** Vested ownership is of two kinds, it may be vested in interest. Let me illustrate them by examples A gives property to his son B (ii) A gives property to B his son for life thereafter to C. In the first example, there is no difficulty whatsoever, as the title of A is perfect takes a vested interest in the property. B gets not only vested ownership of the property, but also immediate possession and enjoyment of it. This is vested in possession.

In the second illustration, so far as B is concerned he takes vested ownership of his life estate. Where C is concerned as there is no uncertainty about the vesting of the property in him, he too gets vested ownership of the property simultaneously with B. at one and the same time there is vesting of the two estates. The life estate in B and the remainder in C. vesting of the remainder in C is not postponed until after the death of B. Even during B's life time the vesting of the remainder takes place in C. So both B and C have vested ownership, yet there is a distinction and that distinction is where C's remainder is

> **Check Your Progress**
>
> 6. What are the kinds of vested ownership?

concerned, the possession and enjoyment of it is postponed to a future date until after death of B. this is vested in interest. So **vested in possession is a right to the immediate possession and enjoyment of property. While vested in interest is a right not to the immediate possession and enjoyment of property**. Two facts are worth to note. I) In the second illustration even if C were to die during B's life time, C's heirs will succeed to the property on the death of B as vested ownership is an inheritable right and ii) Even during B's life time C can transfer his remainder, as vested ownership is a transferable right.

In Adam's v. Mr.s Gray A.I.R. 1925 Madras 599 Trottes C.J., of the Madras High Court held, If a bequest is to a person for life and after his death to his children, the bequest becomes vested in each as and when he or she is born and vesting is not postponed till the death of the life tenant.

In Sashi Kantha v. Pramada Chandra AIR 932 Cal 609, the Calcutta high court draw a clear distinction not only between vested and contingent ownership, but also between the two kinds of vested ownership in the following observation. An estate or interest is vested as distinguished from contingent either when enjoyment of it is presently conferred or when its enjoyment will certainly come to pass, in other words an estate or interest is vested when there is an immediate right of present enjoyment or a present right of future enjoyment. An estate or interest is contingent if the right of enjoyment is made to depend upon some event or condition which may or may not happen. In other words an estate or interest is contingent when the right of enjoyment is to acquire on an event which is dubious or uncertain.

**7.3.5. Contingent ownership:** i) A gives property to B for life, thereafter to C if he is then alive, if then dead to D. ii) A gives property to B provided he marries C.

In the first illustration B gets a life estate which is vested in him absolutely, so it is vested ownership. So far as C and D are concerned the property is vested in them merely conditionally, as vesting of the property in each of them depends upon uncertain condition which may or may not be fulfilled. Where C is concerned, he must survive B where D is concerned, C should die during B's life time. In this illustration both C and D survive B, then on B's death

(Space for Hints)

C's contingent ownership becomes vested ownership and D's contingent ownership is absolutely destroyed. But on the other hand if C does not survive B then on B's death it is D's contingent ownership that become vested. The property will not pass on C's heirs. So during B's life time neither C nor D can alienate the remainder, for a contingent ownership is neither an inheritable nor a transferable right.

In the second illustration, B's ownership is contingent, the vesting will depend on a condition which may or may not be fulfilled. If he marries C well and good, then vesting of the property takes p[lace in him. If he does not marry C but marries, D then his contingent ownership is absolutely destroyed.

**7.3.6. Condition Precedent and Condition Subsequent:** Illustration i) A gives property to B provided he marries C ii) A gives property to B but if he marries C he will forfeit the propriety in favour or D.

In the first illustration B gets only a contingent ownership as he holds the estate merely conditionally. When he marries C his contingent ownership becomes vested ownership. Such a condition, on the fulfillment of which a contingent ownership, becomes vested ownership is called a condition precedent.

In the second illustration, the vesting of the property in B is independent of any uncertain condition. So B gets vested ownership. But the grantor has provided a provision which is that in case B marries C he will forfeit the estate in favour of D. So there is a conditional loss where the vested ownership of B is concerned and this conditional loss will become an absolute loss if he marries C, in which case the vested ownership is absolutely destroyed. So a condition on the fulfillment of which a vested ownership is absolutely destroyed is a condition subsequent.

In the same illustration D also has an interest which is contingent on the happening of an event which may or may not happen. Here it is B's marriage to C. In case B marries D, then D's contingent ownership becomes vested ownership. So the same condition marrying C is both a condition precedent to the contingent ownership of D and a condition subsequent to the vested ownership of B.

7.3.7. **Spes Successionis:** A spes succession is not property both in English and Indian law. It is nothing but an **expectancy of succession.** A person may have every hope of succeeding to this property of a relation on his or her death, but this does not amount to a right of property. Suppose I have an uncle or an aunt wealthy and I am a favoured niece I cherish a fond hope that they will remember me in their will and leave me a little something of their worldly goods. This is an expectation.

This is spes succession is and not being property can neither be transferred nor inherited.

In English law a transfer of a spes successionis does not confer any interest in property, yet if it is assigned to valuable consideration, it is supported in equity as a contract to assign if and when expectancy becomes an interest, and when that happens on the maxim that which ought to have been done is deemed to have been done treats it as a perfected assignment. As a matter of fact in England a person who has such an expectation is allowed to sell such a spes by action. In the event the spes becomes an interest i.e. she or he is the legatee of the deceased testator, or the purchaser takes the legacy, for whatever it is worth, both the benefit and the burden is that of the purchaser. If the spes was purchased for 1 and the legacy 10,000 the entire legacy passess to the purchaser. Conversely if the purchaser had paid 500 but the legacy is 1 she, the loss is that of the purchaser.

## 7.4. POSSESSION

Possession brings about important legal relation and so every system of law, even primitive ones had rules to protect possession. We need material things, such as food, clothing and shelter for living. All these we have to get hold or must possess them. So possession of these material things is very essential to life itself and from this we conclude that possession is the most relationship between men and things.

In one sense possession began as a fact of physical control. Therefore before there was law there was possession. This possession which started as a mere fact has enormous legal significance a fact to which legal rights are attached

**Check Your Progress**

7. What is meant by Spes Successionis?

(Space for Hints) and the legal consequences which flow from the acquisition of possession are so many, so varied and so serious that today if has in its treatment become pure technically of the law.

When a person has the physical control of the thing, certain legal consequences and advantages comes to be attached to the possessor for instance both in Roman and English law possession was treated as evidence of ownership until the contrary was proved and the contrary had to be proved by rival claimant. Even today this fundamental principle of jurisprudence holds good. Then again possession was the basis of certain remedies, called possessory remedies, or interdicts, by which sometimes possession was protected even against the true owner himself possession becomes very important when we realize that it is one of the modes of acquiring ownership.

**7.4.1. Possession in fact:** Possession began as fact, as the physical control over the thing. This was nothing but a physical relation between a person and the thing over which he exercised physical control. This is called possession in fact. **Possession in fact is nothing but the physical control over the thing to the exclusion of everyone else.** The possession of the servant and agent, of the goods belonging to the master or principal as the case may be only possession in fact, a mere fact. This is called detention or custody. This possession in fact is devoid of all advantages.

**7.4.2. Possession in law:** Now when the law steps in, it complicates the idea of possession. There are more complications when the law wanted to give possession or the right to exercise a claim to the exclusive control of a thing, and along with it all the rights and advantages which are closely associated with the idea of possession or physical control even to a person who had no actual control over it. For example, an absentee owner where the goods are in the custody of his servant, or a lesson where the possession of his property is in the lessee. In order to achieve this purpose of law, the law raised a mere physical relation to become a juridical relation called possession in law or possession or simply possession and this was done by adding on the physical control of the thing, intention to exercise the physical control to the exclusion of everyone else.

**Check Your Progress**

8. What is meant by Possession in fact?

(Space for Hints)

So possession is the union of two elements the physical element or the corpus possessionis and the mental element or the animus possidendi.

The nature of physical control and intention will vary according to circumstances. When at a railway station the porter is in charge of the luggage, although he has the actual physical control over the luggage, yet the law gives its owner the possession, because he has not lost the physical control viz. the corpus possessions. The same principle applies where the servant or the agent is in possession of the goods of the master or principal as the case may be. So the question is when a person does not have the things within his grasp, can he have the corpus possessions of possession? the answer to this question is to be found in the elements that constitute the corpus of possession.

The elements of corpus possession is: In this illustration given above the corpus element of possession is not lost, so there is no loss of possession when a domestic animal strays, possession is not lost but it would be otherwise if a wild animal escape from captivity then the corpus is lost and consequently possession too is lost.

You will note that in the first three cases corpus is not lost and therefore, possession is not lost, whereas in the fourth case, that of the wild animal corpus is lost and therefore, possession is lost. Therefore to constitute physical element of possession or the corpus or corpus possession (i) There must be a guarantee of control between the person in possession and the thing possessed ii) so long as there, is a guarantee of control physical control is not necessary iii) the physical control may be exercised by a servant or agent.

So in the above first three cases although the possessor does not have actual physical control in the sense he does not have the things within his grasp, but in so far as he can exercise control that alone is sufficient to give him the corpus element of possession. In the case of a domestic animal even if the animal has strayed, so long as the animal has the animus revertendi (to return) it can be easily retrieved; but not in the case of a wild animal, it is fear nature (wild animal, dangerous animal), which does not have the animus revertendi, and hence, there cannot be any question of a guarantee of control. So corpus is lost.

**Salmond deals with the corpus possession under two headings.**

**7.4.3. a) Relation of the Possessor To The Thing Possessed :** This relationship according to Salmond consists in the possessor making such use of the thing as accords with its nature and his claims over it; for example if I am the owner of a ring, I must be able to exercise my rights over it, such as they are that of retaining possession of it, until I am paid what is due to me and also able to exclude not only the rest of the but until the loan is repaid by the owner himself. If I want to possess a fish I must have the fish secure on in my line or my net. To put it briefly the animus must be effectively embodies in the facts i.e. there must be no barrier between the person and the thing possessed.

**7.4.4. b) The Relation Of The Possessor :** To Other Persons; as pointed out earlier, the essence of possession is exclusiveness. The possessor should intend to exclude others from the thing. The possessor should exercise physical control over the thing to the exclusion of everyone else. There should be a reasonable expectation that the possessor will not be interfered with the use of the thing he possess. To Salmond there are several source from which this measure of security from interference by others can be derived.

**7.4.5. i) The Physical Power of the Possessor:** (I) If you try to grab something from my grasp, I can prevent this alien interference with my physical power ii) **The personal presence of the possessor**; A dying man, a child are able to acquire and retain possession by their physic presence iii) Secrecy. By hiding a thing the possessor can always exclude alien interference iv) **Custom:** If a man has enjoyed a right year after year he can reasonably expect to continue to enjoy that right the next year without interference. For instance, if a man has ploughed and sown and reaped a harvest for several years it is his reasonable expectation that he will have the use of the field in the coming years also v) **Respect of rightful claim.** When the community knows that the possessor of a thing has a rightful claim to it, such claim is accepted and respected by the community at large. (vi) **The manifestation of the animus domini**. The animus can be manifested only by an overt act, and one of the forms it takes is actual use vii) **The protection afforded by the possession of other things**; generally the

possession of a receptacle like a box of envelope gives possession of its contents also.

(Space for Hints)

**7.4.6. Elements of The Animus possidendi:** Whether or not the possessor uses the thing for himself he must have the conscious intention to exclude others from exercising control over the thing. This amounts to animus possidendi or the mental element of possession. So far as material things are concerned this intention to exclude others must be accompanied with the ability to use the thing for oneself at will, which need not be actual physical control but merely a gurantee of physical control.

I may keep a watch under lock and key for ten long years without using it during that period. So long as I have the intention to exclude others from it and, have the ability to use the thing at will, then I have possession. So where possession of material things or corporeal possession is concerned, the essence of possession is not use or enjoyment but exclusiveness.

As to the animus domini if it is the intention which an owner has, then the tenant, borrower etc cannot be given possession. Roman law did not give possession to non owners of property. But John, Holmes and Salmond took the stand that the animus domini is only the intention to exclude others from the physical control to the animus possidendi.

They are: The animus possidendi is not necessarily a claim of right. It may be consciously wrongful. A thief's possession is as true as that of the owner himself, because her takes the thing with the requisite animus (ii) The claim of the possessor must be to exclude others from the things, but such claim to exclude others need not be absolute. I may possess land you may possess a right of way across it. Our claims to that which we possess are not adverse and therefore mutually not destructive (iii) The claim of the possessor must be to exclude others from the things. But such claim to exclude others need not be absolute. I may possess land you may possess a right of way across it. Our claims to that which we possess are not adverse and therefore mutually not destructive (iii) The claim need not be to use the things as owner. The tenant or a borrower claim not as owner but only as encumbrancer, but their possession is as that of the owner. For the time being they have the exclusive use of the thing, and this

**Check Your Progress**

9. What are the elements of Animus Possidendi?

(Space for Hints)

claim of exclusive use is available even against the owner himself. iv) The animus need not be a claim to use the thing at all. A pledge, or a bailee has possession, though his right is merely to detain the thing until he is paid. v) The claim need not one's own behalf. A servant or an agent has true possession, though he claim the exclusive use of the thing on behalf of another vi) The animus need not be specific. It may be merely a general intent to possess a class of things is sufficient to give possession of the individual object, belonging to that class. I possess all the books in my library even though I have forgotten the existence of some of them.

## 7.5. CONCEPT OF POSSESSION

The concept of possession in English law is analyzed by Salmond, Pollock, Wright and Gundhar; into the following propositions.

1) **Possession is evidence of ownership.** The presumption of the law is, the possessor is the owner until the contrary is proved and the contrary has to be proved by the rival claimant. So possession is a claim that is available against the whole world except the true owner and earlier possessors. In some systems of law the law goes to the extent of protecting possession even against the true owner himself.

The proposition is well illustrated by the case of Armory v. Defemirie Strange. In this case a chimney sweeper found a jewel and took it to the defendant a goldsmith to discover its value. The defendant refused to return it, alleging that the boy was not its owner. In a suit by the chimney sweeper for possession of the jewel, the court held that the plaintiff had a better right than the defendant, as he was a prior possessor. As between the plaintiff and defendant, the defendant must show a better title or else return the jewel to the plaintiff.

2) **When a person is in possession of a receptacle, such as a bag, cabinet or envelop, his possession of it automatically gives him possession of contents also.** But in several cases, law of Larceny has held otherwise.

**Check Your Progress**

10 Explain the concept of Possession

Larceny requires a) a taking without a claim of right made in good faith b) and the carrying away of something capable of being stolen. C) without the

consent of the owner d) and with the intent at the time of such taking permanently to deprive the owner thereof.

(Space for Hints)

**In R V Mucklow:** An envelope was delivered to the defendant by mistake, since his name was the same as that of the addressee. There was a banker's draft in it, which he cashed. It was held not to be larceny on the ground that the intention on receiving the envelope was to receive its content also. So the intention was innocent, and possession of the bank draft was therefore obtained innocently.

But in R. v Hudson (1943) K. B. 458 the prisoner received a letter that was intended for some one else. A kept it for a few days. on opening it found a cheque, which he appropriated for his own use. He was held guilty of larceny on the ground that he got possession of the cheque not when he innocently got possession of the envelope, but when he was aware of its existence, and at the time he became aware of its existence he look it animus funandi.

In Cartwright v. Green (1803) 8 Ves 105 carpenter while repairing a bureau given to him for repair, discovered a secret drawer and some money in it. He spent it. held that he got possession of it only when he misappropriated the money.

In Marry V. Grean (1841) 7 M & W 623 where the plaintiff bought a very old bureau and latter found and used the money in its secret drawer, the same argument as in the earlier case was advanced to convict him. The property in the form of money was held to be the sellers even though the seller was not aware of its existence as the bureau was a very old one.

In R. v. Ashwel (1885) 16 Q B D 190 A had given B a guinea thinking it to be shilling for it was very dark night. B discovering the mistake did not return the balance but retained it for himself. It was held he got fraudulent possession of the guines not when he innocently thought it to be a shilling but latter when he discovered the mistake so it amounted to larceny.

On a closer examination of these cases, one wonders how a man, could be in possession of that, of the existence of which he is unaware, in non of these cases were all the factors that constitute theft or larcency coincides for the

Space for Hints)

judgement to be what they were. So English case law is not very clear not his point.

3) The possession of land carries with it in general possession of everything which is attached to or under that land. The student must again be reminded that for possession, both the elements must be coincident in the same person.

Unless the possessor has corpus possessions and animus possidenid united in him at the same time there can be no possession of a thing. The absence of any one of the elements, will negative the very fact of possession. The following cases will again show that so far as English law is concerned there is no clear cut idea on this point also. Yet this proposition of Pollock and Write was the basis of the judgment which I am going to discuss below.

In South Staffordshire Water Works Co. v Sharman 1896 2 Q B 44 the defendant was employed by the plaintiff to clear their pond. The defendant found three gold rings on the bed of the pond and claimed that he as the finder of a res nullias (ownerless thing) had got possession of these rights. But the court held that the landlord owner of the pond had possession of those rings.

In Elwess v. Brigg Gas Co (1886) 33 ch. D. 562 the pre historic boat found six feet below the surface by the lessees. The Gas Works while excavating the land to create their gas works was held to be in possession of the landlord. They held that in all such cases it was of no importance whether or not the plaintiffs were aware of the existence of the rights or the boat, as the rule should be that the possession of land carries with it in general possession of every thing which is attached to or under that land.

Salmond support the decision in Sharman's case on the ground that when a servant or agent finds in the course of employment as a result of the work which he is appointed to do, does not have possession for he finds it not for himself but for his employers.

4) It is doubtful whether a person is regarded as possessing in the law a thing that is lying unattached on the surface of his land or in his house where the thing is not possessed by some one else. The reasonable rule should be that

whatever rule applied to things attached to the land or under it should be applied to things lying unattached, but the rule does not seem to have been applied in quite a number of cases.

(Space for Hints)

In Bridges v. Hawkesworth (1851) 21 L.J. K. Q. B. 75 the plaintiff customer found a parcel of bank notes on the floor of the defendant's shop. It was held that the plaintiff got possession of them and not the defendant who was unaware of the bank notes lying on the floor of his shop.

In Hannah v. Peel (1945) K B 509 Bridge's case was followed. In this case the defendant owner of a house never occupied the house. It was requisitioned in 1936 and allotted to plaintiff, a soldier, who found a brooch in the house. It was held that the owner never had possession of the house and therefore, of the brooch. So the soldier plaintiff had a better title to it. Another point to remember is that finder must be lawfully on the land or on the premises.

In R. V. Moore (1861) L & C I the pr9isoner had picked up and converted to his own use a bank note which had been dropped on the floor of his shop. He knew who the owner of it was. He was convicted for larceny. Held that he had not obtained possession of the note while it was lying on the floor of his shop before he had discovered it, and further that the owner's possession was in some way extended at least fictionally, after he had lost the note in accused's shop. So where the prisoner picked up the bank note his animus was to steal it.

The student now realizes that the law relating to possession is complicated. The possession is only a matter of convenience and policy is the view held by more than one writer.

Glanville Williams the learned Editor of Salmond's Jurisprudence writes a complicated legal idea of possession there certainly is, though it varies from one branch of the law to another, and even within the same branch of the law, according to the particular rule.

**Concurrent Possession:** It is a general maxim of the law that two persons could not be in possession of the same thing at the same time. This is quite true, for you will remember that the essence of possession is exclusiveness and therefore two persons could not be in possession of the same thing at the same

(Space for Hints)

time. But Salmond has shown when the claims to possession are not adverse and therefore mutually destructive, it is possible to have concurrent or duplicate possession.

**1) Immediate and Mediate Possession:** As I write this lesson with my pen I am in immediate possession of the pen. If I were to go personally and buy a pen and seller delivers the possession of the pen to me, I get the immediate possession of the pen. So when the relation between, the possessor and the thing he possesses is direct it is immediate possession. So a thing which is acquired or retained directly or personally is immediate or direct.

When the servant or agent has the custody of the goods of the master or principal, the servant or agent has the immediate possession of them; but they possess the goods for and on account of the master or principal. So the master or principal has possession, but it is possession held by the master or principal through the intervention of another. This kind of possession of the pen, but because he claims possession on my account, I also get possession of the pen.

He possesses for me, and I possess through him so mine is mediate possession. The relation between myself, the mediate possessor, and the pen is an indirect relation. But when my friend hands over the pen to me them the immediate repossession is transferred to me and I become the immediate possessor of the pen.

From the above illustrations it must be quite clear to you that every case of mediate possession is an instance of duplicate or concurrent possession, but the converse is not true i.e. mediate possession can only coexist with immediate possession but immediate possession need not co exist with mediate possession.

From the above illustrations it must be quite clear to you that every case of mediate possession is an instance of duplicate or concurrent possession, but the converse is not true i.e. mediate possession can only coexist with immediate possession but immediate possession need not co exist with mediate possession.

Mediate possession may arise in three different ways, and each kind differs from the other in its legal consequences.

(Space for Hints)

i) That acquired by a master or principal through a servant or agent. Here the servant or agent has mere custody as no claim on their behalf is made. The claim is solely on behalf of the owner of the property in their custody, viz, the master of principal. As the claim is on behalf of the owner, they get mediate possession which is legal possession. As a consequence in case of theft or trespass it is the owner whose right is violated and so has a cause of action against the wrong doer.

ii) The held through a borrower, him, bailee or tenant at will. Here both have possession as the possession over the thing is claimed not only on behalf of the owner but also on behalf of the borrower or hirer and the owner has a right to demand the thing at will. So the borrower, hirer etc. I have the immediate possession and the owner the mediate possession. In these cases, in case of theft or trespass to the property the rights of both the possessors are violated.

iii) The acquired through a borrower for a time, a pledge, a bailee for a term. Here the immediate possession is claimed by them solely on their account until the fulfillment of a condition (payment of the debt) but the superior title of the owner is recognized to get back possession of the thing once the condition is satisfied or the term expires. So the owner has the mediate possession. In case of theft or trespass some jurists hold that both can prosecute, but there are some that takes the view that only the immediate possessor has the right to prosecute the wrongdoer and the owner has only a claim against the immediate possessor as they are of the view that the owner does not have possession, at all, but only a right to recover possession at some future date.

2) The second kind of duplicate or concurrent possession is when two ro more persons possess the thing in common. Co-owners of a thing are a class of persons who not only own the thing in common but also possess it in common. The claim to possession each is not adverse to that of the rest, it is possible to have duplicate possession.

3) A third instance is, it is possible to have corporeal possession co-existing with incorporeal possession. For example, I may possess land but you can possess a right of way across it. So long as our claims to possession are not adverse and mutually not destructive it is possible to have duplicate possession.

(Space for Hints) In the illustration given, as possessor of land I exclude you from the use of the land and you as possessor of the right of way, exclude me from the use of the way. Rather from claiming possession of it.

## 7.6. MODES OF ACQUIRING POSSESSION:

Possession is made up of the elements of corpus and animus as already seen. So when these two elements coincide in a person possession is acquired. So there are three ways in which possession can be acquired. They are the following.

**1. Taking:** To acquire possession by this mode, the person must take the thing with the necessary animus. In case there is an owner or possessor, he must take the thing without his consent. Taking may be rightful as when the possessor catches a fish from the sea or the unpaid innkeeper right of distrait of goods belonging to the lodger which he exercises when a lodger fails to pay the bill. Then again the taking may be wrongful as when a thief steals thing. As the two element of possession coincide in him he gets legal possession of the thing.

**2. Delivery:** Here possession is acquired when the original possessor voluntarily relinquishes his possession in favour of another. It may be actual when for the first time the two elements of possession coincide in the transferee, as in an outright gift or in a loan of a chattel. In the former case the transferor does not retain the mediate possession whereas in the latter case the transferor retains the mediate possession.

Delivery may also be constructive, where there is no physical dealings with the thing but by mere change in animus possession is secured. The various ways in which it may arise are a) In the case of loan of a chattel, the lender has mediate possession and the borrower immediate possession.

| Check Your Progress |
|---|
| 11. What are the various modes of acquiring possession? |

Supposing the lender asks the borrower to retain the chattel for himself as a gift then the mediate possession is also transferred to the immediate possessor by mere change of animus b) Where the mediate possession, as in the case where I buy a horse and allow the seller to retain possession of the horse for his own use for a month c) Where the mediate possession remaining in a third person, as in the case where A has leased out his farm to B, and subsequently A sells the

farm to c. B still continuing as the lessee. Here B atoms to C i.e. recognizes the title of the new owner C. This is constructive delivery by attornment.

**3. Operation of law:** On death or insolvency of a person the law removes property from the control of one person and gives it to be controlled by another; either the heirs of the deceased person or the official assignee as the case may be.

**Incorporeal possession:** Whether possession is corporeal or incorporeal, the essence of possession is exclusiveness and both the elements of corpus and animus are necessary.

In corporal possession therefore, there is no need of use and enjoyment of the thing, so long as there is continuing exclusion of alien interference, coupled with the ability to use the thing at will is sufficient for possession. But where incorporal rights are concerned the only mode of excluding others is to use and enjoy the contents of the right for oneself. There is no other mode of exclusion. So there must be continuous, repeated and actual use and enjoyment of the content of the right. Non use is inconsistent with incorporeal possession.

### 7.6.1. Relation between Ownership and Possession

Possession primary is a fact, and ownership is the de jure recognition of it. If a chattel that I own is stolen, possession of it is lost but I am still its owner. These two, ownership and possession tend mutually to coincide for generally the owner of a thing is its possessor also. It is a fact that ownership strives to realize itself in possession, and possession endeavors to justify itself in ownership. The law of limitation and prescription provides that when there is ownership with possession, where the possession is in an adverse possessor then due to efflux of time the right of ownership withers away and dies and the possession of the adverse possessor ripens into ownership.

Generally whatever may be owned but possessed and what every may be possessed may be owned. This is true of corporeal property but there are certain exceptions to this general rule where incorporeal things or rights are concerned.

There are certain rights which an be owned but not possessed as they are incapable of repeated and constant use and enjoyment. They are extinguished on fulfillment such is the case of a debt. They are called transitory rights. There are

(Space for Hints) some right which can be possessed without its ownership vested in anyone else; such as a copyright which is available only for a term of years. After the expiry of such term the right of ownership is absolutely extinguished, but the person who continues to enjoy the content of the right is the possessor.

## 7.7. POSSESSROY REMEDIES:

Every system of law recognizes that possession is a very valuable right and thus protects it, sometimes even against the true owner himself. The true owner who has a rightful claim, to the thing can be restrained from retaking the thing and if he has retaken it, he can be compelled to restore possession and then proceed through a court of law for the recovery of the thing on ground of a superior title. The suit of the dispossessed possessor is a possessorium (a possessory suit) while that of the owner is petilorium (a proprietary suit).

Indian law also protects possession. Section 6 of the specific relief Act 1973, provides for these possessory remedies, but in order to avoid duplication of suits it has made provision for a compromise, which is, if the dispossessor brings his suit within 6 months from the date of eviction, he will be allowed to succeed merely on the ground that on the day of dispassion, he was in actual possession of the property. But if he is not vigilant and so brings his suit after six months even the defendant will be allowed to succeed on grounds of a superior title.

Section 145 of the criminal procedure code provides that a magistrate on information fearing a breach of the peace, puts the dispossessed possessor back in possession or if not dispossessed then restrains the disturber from causing disturbance. He does not go into the merits of the case, he is interested in the law and order situation so prevents the parties from taking the law into their own hands.

## 7.8. JUSTIFICATION FOR GRANTING POSSESSORY REMEDIES

These possessory remedies are justified on several grounds

(Space for Hints)

(i) If a man is allowed self-help there is bound to be a breach of peace, therefore, in the interest of public order and safety on one is allowed to take the law into his own hands.

(ii) In olden days there were hardly any document relating to title to property and the only way of proving ownership was by showing continuous possession.

(iii) The student has already been told that possession happens to be one of the modes of acquiring property. The person who first takes possession of a *res nullias* becomes its owner.

An adverse possessor of a thing, can become its owner by being in continuous possession of it for the prescriptive period. If it is immovable property, for twelve years and a shorter period, which varies in different systems for movables.

iv) It is very difficult to prove ownership, it exists only de jure being a mere right, but as possession is a fact and exists de facto it is easy to prove the possession of thing. So the law protects possession, for otherwise it will be unfair and unjust for an usurper or trespasser to push the heavy burden of proof from his own shoulders on those of the dispossessed possessor, because the presumption of the law, is that the possessor is the owner until the contrary is proved and this contrary has to be proved by the rival claimant. Indian law provides in Sec, 110 of the Indian Evidence Act. The burden of proving that he is not the owner is on the person who affirms that he is not the owner. So the law helps the dispossessed possessor by compelling the dispossessor to restore possession and then go to a court of law and prove if he can, his higher right to tit. It is seen therefore litigation is thus multiplied as there is a duplication of suits one possessory suit and the other a proprietary suit. Section 6 of the Specific Relief Act, 1963 as stated above has already struck a compromise to get rid of the duplication of suits.

(Space for Hints)

Salmond himself is for simplifying rules of evidence to help the parties to the dispute and have their relative claims for possession decided in the possessory right of the plaintiff itself. The rules of evidence advocated by Salmond are:

**Prior possession prima facie proof of title.** According to this rule if the plaintiff is able to prove that his possession is older to that of his rival, then the law will assume in the claimant a better title.

But the above presumption can be negatived by the defendant, proving a better title in himself. Then the plaintiff will be non suited.

The defence of *jus tertii* (Title of third parties) will not be allowed to the defendant who cannot allege that the plaintiff is not the owner but some third party is the owner, as happened in the case of *Armole v. Delomire*. The title of third parties is irrelevant.

But in these cases he can plead the defence of *jus tertii* (a) when the defendant defends the action on behalf of any one by the authority of the owner b) when the act of eviction complained of was committed with the authority of the owner and (C) when the defendant has restored the property to the owner.

The joint operation of these rules is much more satisfactory and reasonable way of adjusting the burden of proof of ownership with perfect equity than the cumbrous duplication of proprietary and possessory remedies.

## 7.9 SUMMARY

Ownership denotes the relation between a person and an object forming the subject matter of ownership. It consists in a complex of rights all of which are rights in arm being good against the entire world and not merely against specific persons. To Salmond the right of ownership is not a single right, it being a bundle of rights, liberties, powers and immunities. Holland defines it as a plenary control over an object and Austin He defines ownership is a right indefinite in point of user, unrestricted in point of disposition and unlimited in point of duration over a determinate thing. The Jurists defined the ownership in different ways there is no uniform definition regarding Ownership. The next is Possession it brings about important legal relation and so every system of law, even primitive ones had rules to protect possession. The concept of possession is

also discussed by various authors . Further we also discussed about Possessory remedies in this lesson.

(Space for Hints)

## 7.10. KEY WORDS

| | | |
|---|---|---|
| Corporeal | - | having or consisting of |
| Incorporeal | - | it not object of sensation, are creature of mind |
| Physical possession | - | exercising physical control over a thing |
| Sole ownership | - | Full ownership |

## 7.11. ANSWER TO CYP QUESTIONS

| | | |
|---|---|---|
| For Question No. 1 | - | Refer section 7.1 |
| For Question No. 2 | - | Refer section 7.2 |
| For Question No. 3 | - | Refer section 7.3. |
| For Question No. 4 | - | Refer section 7.3 |
| For Question No. 5 | - | Refer section 7.3.3 |
| For Question No. 6 | - | Refer section 7.3.4 |
| For Question No. 7 | - | Refer section 7.3.7 |
| For Question No. 8 | - | Refer section 7.4.1 |
| For Question No. 9 | - | Refer section 7.4.6 |
| For Question No. 10 | - | Refer section 7.5 |
| For Question No. 11 | - | Refer section 7.6 |

## 7.12. MODEL QUESTIONS

### (A) Long Answer Questions

1. Analyse the different kinds of mediate possession.
2. What are the three ways of acquiring possession?

(Space for Hints)

3. What are possessory remedies? Explain the material basis for such remedies?

**(B) Short Answer Questions**

1. What is meant by ownership? What are the chief kinds of duplicate ownership?

2. What is meant by Immediate and Mediate Possession

3. Write shorts notes on:

   a. Incorporeal possession

   b. Jus Necessitatis

   c. Vicarious liability

# UNIT – 8

# THE LAW OF PROPERTY AND THE LAW OF OBLIGATIONS

## INTRODUCTION

The word property is capable of a number of meanings. In the first sense, property only meant tangible things such as land, house, horse, furniture etc. Today the boundaries of property have over run its narrow limits and it includes all rights to both tangible and intangible property, such as right to a debt and a patent right.

In the second sense, all rights of whatever nature, to tangibles or intangibles, proprietary or personal whether they are rights in rem or rights in personam, are the property of a man. A man's property is all that is his in law.

In third sense, not all rights are property, only those of economic value alone will be property as opposed to the purely personal rights which are not of economic worth.

In a fourth sense, not all proprietary rights are property, only those which are proprietary and in rem i.e., right to land, house and chattel, these alone are property; whereas the proprietary rights in personam i.e. rights to debts, valuable contracts are not proprietary, they pertain to the realm of obligation. So the law of property is the law of proprietary rights in rem and the law of proprietary rights in personam is the law of obligations.

There is yet another distinction between property and obligation, the former is known as chose in possession and the later as chose in action, depending upon the mode of exercising ones claim to them. The former can be claimed by taking physical possession of them, but the latter only by action as they are all intangibles, happening to be rights. In this lesson we are going to discuss about Law of property in detail.

(Space for Hints)

## OBJECTIVES

- To know about the meaning of property.
- To know the various kinds of property.
- To know the various modes of acquiring property.i
- To understand the law of Obligations

## STRUCTURE

8.1. Definition

8.2. Theories of Property

8.3. Types of Property

8.4. Servitudes

8.5. Mortgage

8.6. Modes of Acquiring Property

8.7. The Law of obligations

8.8. Summary

8.9. Key words

8.10. Answer to check your progress questions

8.11. Model questions

## 8.1. DEFINITON

*Salmond,* defined ownership in material things, as the general, permanent, and inheritable right to the use of that thing.

**a) It is a general right:** The owner of a material things has right to the aggregate of its uses. See person who has only a special and limited right to the use of it, such as a lessee or mortgagee is not the owner but only the encumbrancer of it, whether there are or are no encumbrances, the right of ownership remains.

(Space for Hints)

**b) It is a permanent right:** As the right of ownership is a right to the aggregate of its uses, it outlasts all the special and limited right to use vested in encumbrances. So we say it is a permanent right, lasting as long as the thing over which it exists lasts.

**c) It is an inheritable right:** Naturally a permanent right, one which lasts so long as the things over which it exists lasts, has to be an inheritable right. An inheritable right is one which is not extinguished by death, so it survives the death of its owner, and devolves upon his successors or legal representatives.

## 8.2. THEORIES OF PROPERTY

There are two types of theories of property, one attempts to explain how property came to be, to describe the facts; the other passes an ethical judgment on those facts and attempts to justify or condemn the institution of private property Sometimes, however these two aims are combined for e.g. a writer argues that property arose to reward private enterprise and that therefore it is ethically justifiable.

**8.2.1. The occupation Theory:** The oldest and until recently the most influential defence of private property was based on the assumed right of the original discoverer and occupant to dispose of that which thus became his. He who first reduces into possession a piece of property has the best of justification for remaining in control. This view dominated the thought of Roman jurists and of modern philosophers from Grotius to Kant so much. So the right of the labourer to the produce of his work was sometimes defended on the ground that the labourer occupied the material that he fashioned into the finished product.

### Criticism

a) Maine suggests that the doctrine of occupation conferring title is the result of later thought. It is only when the rights or property have gained a sanction from long practical inviolability and when vast majority of the objects of employment have subjected to private ownership that mere possession is allowed to invest the

**Check Your Progress**

1. Explain the occupation Theory.

(Space for Hints)

first possessor with domina over commodities in which no prior proprietorship has been asserted.

b) According to Cohen few accumulations of great wealth are ever simply found. Rather they were acquired by the labour of many by conquest, business manipulation and by other means. It is obvious that today at any rate few economic goods can be acquired by discovery and first occupancy. Moreover even if we were to grant that the original finder or occupier should have possession as against any one else, it by no means follows that he may use it arbitrarily or that his rule shall prevail indefinitely after his death. The right of others to acquire the property from him, by hargain, by inheritance of by testamentary disposition in not determined by the principle of occupation.

**8.2.2. The Labour Theory:** This theory regard property as the result of individual labour. Industry should be encouraged by granting to a worker the ownership of any *res* which is created by his toil.

But this doctrine seems to imagine a simple state of society in which each man create his own products. Things must be created out of something if the material be a *res nullius* there is something to be said for rewarding the work of the creator. However, in modern societies economic goods are never the result of any one man's unaided labour. How shall we determine what part of the value of a table should belong to the carpenter, to the lumbeman, to the transport worker, to the policeman who guarded the place while the work as being done and to the indefinitely large number of others whose co-operation was necessary. Moreover such wealth is not the result of labour at all but of some fortunate accident.

**Check Your Progress**
2. What is Labour Theory of Property?

**8.2.3. The Personality Theory of Property:** Hegal, Ahrens Lormer and other idealists have tried to deduce the right of property from the individual rights to act as a free personality. To be free one must have a sphere of self assertion in the external world. A person's

private property provides such an opportunity. The community has slowly evolved from status to contract from group holding to individual property, liberty having grown in the process and it is the control of property that makes men free. He who is wholly dependent on property controlled by the others in their own interest can hardly live the life of the free. This theory leads to conclusion that society should be so organised that every member can toil within his powers acquire such property as is necessary for true self realisation.

(Space for Hints)

8.2.4. **The theory property is the creation of the State:** According to this theory private property is the creation of the state achieved only after a long struggle with the clan. If we regard as the essential, characteristic of private property the right to exclude others it is true that the state has provided the machinery by which these rights are enjoyed. According to Bentham property and law are born together and if law is taken away property also ceases to exist.

8.2.5. **The Functional Theory :** The increasing tendency of modern times is not to attempt to justify the institutions of private property by *priori* theory but to build doctrines on an analysis of the functioning and social effects of the institution. This approach is sometimes called the functional theory and it lays down that property which is the result of effort or involves the giving of services ethically justifiable but property which is an undeserved claim on the wealth produced by other is no. If property is to be effective in encouraging production then society should see that it is distribute don proper principles.

8.2.6. **Property and Sovereignty:** Property is a relation not between an owner and a thing but between an owner and other individuals in reference to things. A right is always against one or more individuals. So the essence of private property is always the right to exclude others. The law helps me to exclude others from

**Check Your Progress**

3. Explain the functional Theory.

using the things that it assigns to me. If somebody else wants to use the food, the house or the land or the lough that the law calls mine he has to get my consent. To the extent that these things are necessary to the life of my neighbour, the law confers on me a power to do him what I want. This character of property as sovereign power compelling service and obedience may be obscured for us in commercial economy by the fiction of the so called labour contract as a free bargain and by the frequency with which services rendered indirectly through a money payment.

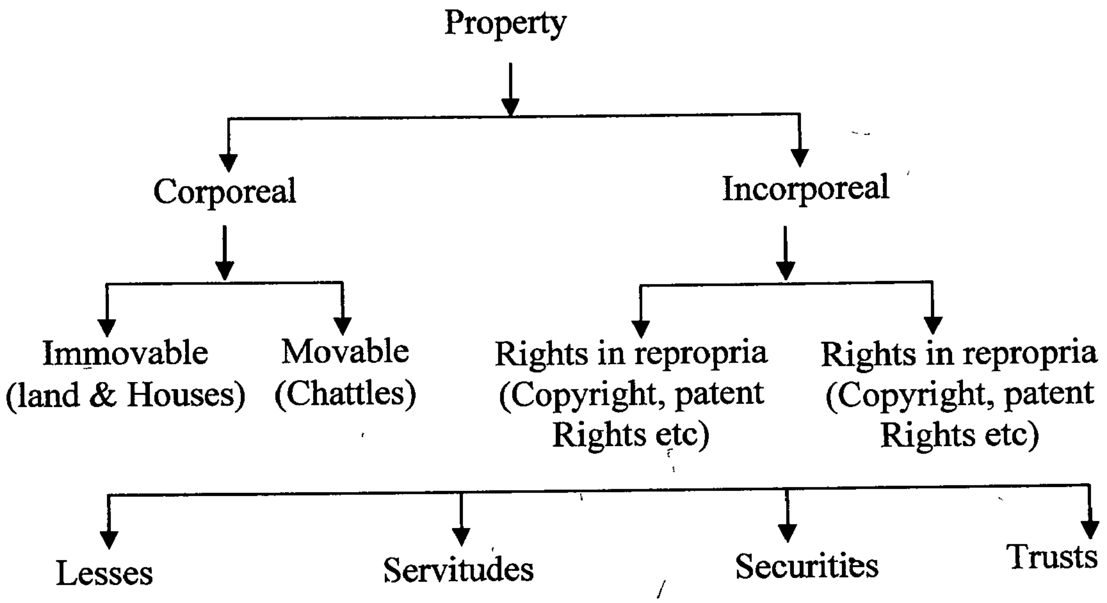
In this context Renner's (a Austrian Jurist) analysis of property in capitalist society is worth considering. Renner chooses the legal institution of ownership as *the basis of investigation* of the extent to which legal order corresponds to the social function of an institution. According to Renner, originally in medical society ownership which in law means the absolute power of disposing of a thing symbolises a unit of which the family farm is typical. It comprises of things not only the houses, the implements of work etc., but also the place of work and production, the place of consumption, the market and the family. In that stage, the legal conception of ownership represents on the whole adequately in economic subsratum. But economic evaluation gradually alters the functions of ownership. Ownership of complex of things new regarded as capital no consider longer with the substrata of personal work; it becomes a source of a new power of common. By means of the power of capitalist exercises a quasi public authority over those who are tied to him by the contract of service the juristic institution is still the same as at the time when the worker also owner the means of production but its function has changed. The owner of certain things can sue for his ownership to control other persons. Legally this is done by the use of ownership as the centre of a number of complementary legal institution such as sale, loan, tenancy, hire and contract of service. By means of contract of service, the worker agrees to hand over the substrata of work to the owner of the capital. Formally this contract an institution of private law is concluded between equals. In fact the liberty of those who do not own the means of production is confined to a certain choice between those to whom they are compelled to transfer by contract their share the reality of the capitalist, exercising a delegated public

(Space for Hints)

power of common. Another change of function takes place. The unity of ownership typical of the former economic conditions is broken up a specialisation in the various function of ownership develops.

Property now becomes a source of power. At the same time the legal ownership ceases to represent the real control of the thing. The complementary legal institutions assumes the real functions of ownership which becomes an empty legal form. Thus ownership has ceased to be what it was. While remaining the legal form an institution of private law implying the total power of doing with the thing what one likes it has infact become an institution of public law.

## 8.3. TYPES OF PROPERTY




**Corporeal Property or Material Things**

Corporeal property is either movable or immovable

**8.3.1. Movable and immovable Property :** These two kinds of material things are governed by different rules. We are much more concerned with immovable property as they are more endurable and cannot be moved, immovable property has certain distinct characteristics. They may be listed below i) It is a determinate portion of the earth's surface, i.e., it can be determined by boundaries. Suppose you want to buy a building site of a certain extent in a particular locality it is easy as the land can be measured out in that locality itself and determined by boundaries. North, east, south and west; as it is immovable ii) Not only the surface is that of the owner, but the ground below the surface down

**Check Your Progress**

4. What are the various types of property?

(Space for Hints)

to the centre of the earth and an air column above the surface. The old rule was an air column ad infinitum. But today due to Air Navigation Acts that air column is cut down. So land is three dimensional (iii) All that is found in its natural state on the surface and below the surface is also immovable property. Hence it includes natural vegitation like forest, minerals, etc. iv) All objects placed by human agency on or under the surface, with the intention of permanent annexation. These will include superstructures, walls, fences, etc. These are part and parcel of immovable property. v) All objects fixed for the beneficial enjoyment of those objects placed by human agency on or under the surface with intention of permanent annexation. So doors and windows of the superstructures are part of immovable property but not carpets, tapestries, lights etc.

**8.3.2. Incorporeal property:** As seen in the above table incorporeal property is made up of rights in re propria in immaterial things and rights in re aliena over both material and immaterial things.

**a) Jura in reporpira in immaterial things:** These immaterial forms of property are of many kinds: Patents; copyrights, commercial goodwill, trade marks and trade names annuities and pensions, stocks, shares, debentures.

These are other forms of intangible property such as insurance policies and debts, and their class goes on expanding as progress in society becomes more and more complex.

**Leases :** Salmond defines a lease as that form of encumbrance which consists in a right, Any transaction of property which has the same characteristics as lease of land is included in the term lease (Jura in re aliena). It includes therefore, bailment of chattels and leases of immaterial property, enjoyment without being fulfilled and extinguished, or in other words that which can be possessed. Why only such immaterial property can be leased will be clear when we study the very nature of a lease to the possession and use of property owned by some other person.

So in a lease the owner separates possession from his ownership and grants it to another the lessee who the time being i.e. during the subsistence of the lease can exclude even the lessor himself. Usually the lease is for a fixed period,

(Space for Hints)

but there is nothing preventing leases in perpetuity in the case of patent rights and copy rights for the entire period of its duration.

A trespasser in possession and enjoyment of property cannot be lessee, because in a lease the lessee rightfully possesses and enjoys the property belonging to another. The lessor need not always be the owner for a lessee may sub let the property and a mortgagee may lease out the property mortgaged to him.

## 8.4. SERVITUDES:

A servitude is also an encumbrance of property, but it consists in a right in rem which givers to the owner of this right, a right to the limited use of property belonging to another. There is neither possession nor ownership involved; e.g., right of way, right to right and support, right of fishery or ferry etc.

**8.4.1. Nature of Servitude:** i) It does not involve the possession of land over which it exists ii) it may not involve an obligation, to do something but merely to abstain from doing something iii) no one can have a servitude over his own property because a servitude is an encumbrance. Once the encumbrancer acquires the property over which the servitude exists, then the inferior right, that is the servitude merges in the higher title of ownership and is extinguished.

**8.4.2. Classification of Servitudes:** 1. Private and public servitudes. The former vests in a private person. These again may fall into two classes. To illustrate, a right of mining on another's land or fishing in the waters of a lake owned by someone else. These servitudes do not exist for the benefit of any land, they are not encumbrances of land belonging to another. These are not true easements, they are profits a pendre, where a profit is taken form another's land. So these classes of servitudes are enjoyed in gross.

The other class of servitudes, such as right of way, right to light and support are servitudes which are not only encumbrances of land but they are accessory to an adjoining piece of land for whose benefit they exist. These are true easements and are called easements appurtenant. The burden and the benefit of these easement appurtenant run along with the respective tenements into the hands of successive owners and occupiers.

**Check Your Progress**

5. What is meant by Servititue?

(Space for Hints)

**8.4.3. Positive And Negative Easements:** A right of way is positive, it is a right that the dominant owner can do something on the servient tenement, so the servient owner is under an obligation to suffer something on the servient tenement.

A right to light is negative. The dominant owner has no right to do something on the servient tenement, his right consists in preventing something being done on the servient tenement. In this servitude, the servient owner can be restrained from constructing a building on his tenement which would materially obstruct the passage of light coming to the dominant tenement across the servient tenement.

**8.4.4. Securities:** A security creates an encumbrance over a specific chattel or a particular piece of immovable property which is made the subject of a charge or a debt. A security is an encumbrance, the purpose of which is to ensure or facilitate the fulfillment or enjoyment of some other right vested in the same person (usually a debt) or, in other words, a security is a right to have recourse to a thing as a means of securing performance of some obligation.

From the definition it is seen that a security involves two rights and two obligations. One, the primary right and the principal obligation (debt) and the second or secondary right is to have recourse to a specific item of property belonging to the debtor if the principal obligation is not performed and the debtor has the secondary obligation to see that he creditor has the security intact. So, the second obligation is to secure the performance of the first.

Both English and Indian laws recognize three kinds of securities the pledge, the lien and the mortgage.

**8.4.5. Pledge:** only chattels can be given in pledge for the repayment of a loan. Possession is transferred to the creditor and such transfer is always accompanied by the power of sale. In a pledge, the debtor retains the ownership and thus is able to exercise his general rights of ownership over the chattel. The moment the loan is repaid, the security comes to an end and possession has to be surrendered to the debtor and that is because a pledge is nothing more than a security.

**8.4.6. Lien:** It can be created both for movables as well as immovables (e.g. unpaid vendors lien. In a lien too what is given to the creditor is only certain rights over the property to be exercised when principal obligation is not performed. The ownership in the property given as security is in the debtor himself as such no undue hardship if suffered by him, at the same time, the rights of the creditor are also protected. The rights given to the creditor very depending on the form of lien.

| | | |
|---|---|---|
| Possessory lien | - | Possession is given to the creditor to be held until paid. It may or may not be accompanied by the power of sale. |
| Power of sale | - | It is an independent form of lien. |
| Right of distress or seizure | - | The right of an inn keeper to take possession of property of the ledger if the bills is outstanding and unpaid. To detain cattle trespassing on land. |
| Power of forfeiture | - | Landlord's right of forfeiture for non payment of rent. |
| Charges | - | These are of two kinds, fixed charges and floating charges. A fixed means that only specific items of property belonging to the debtor are charged with the debt which is thus payable out of it. But a floating charge is where the creditor's security does not attach to any specific property, but to the debtor's property as a whole. |

Whatever maybe the form of lien and the right over the security given to protect the creditor, and however much the creditor is protected, the fact remains that a lien is nothing more than a security lapsing ipso jure on the discharge of the debt secured. Also no undue hardship is created for the debtor as the ownership is still retained by him.

(Space for Hints)

## 8.5. MORTGAGE :

A mortgage can only be of immovable property creating complications of legal relations between the mortgagor and mortgagee. It is not a mere security for a debt, it is something more than a security. When the mortgagor gives to the mortgagee rights over the property as security, in actuality gives to the mortgagee an interest in the property and this interest is also immovable property. So, a mortgage in its own nature is independent of principal right with the result that when the mortgage debt is discharged this independent right is still outstanding in him. For example in an usufrctuary mortgage (where possession of the property is given to the mortgagee to be used and enjoyed until the debt is repaid) even the discharge of the debt the mortgagor has to call upon the mortgagee to surrender possession of the property.

So, considering the relative merits of all the securities, Solmond observes: The ideal form of security is that which combines the most efficient protection of the creditor with the least interference with the rights of the debtor. Whatever can be done by way of mortgage in securing a debt can be done equally well by way of lien, and the lien avoids all that extraordinary disturbances and complications of legal relations which is essentially involved in the mortgage. So the ideal form of security is the lien.

## 8.6. MODES OF ACQUIRING PROPERTY

**8.6.1. Possession :** It has already been seen that possession of a material object is a title to the ownership of it. Claiming it in fact he can make it good in law also by way of ownership to a res nullias he immediately gets a good title to it against all, like fowls of the air and fish of the sea. This is Roman law is called occupation. But if the property belong to some one else, then possession even wrongful is good against all except that someone. Where possession is wrongful the true owner can recover it, even from the earlier possessor; the wrongful possessor cannot set up the defence of **just tertii**. In the case of adverse possession long occupation of it for prescriptive period will vest the ownership in the adverse possessor.

**Check Your Progress**

6. What is a Mortgage?

**8.6.2. Prescription:** A person who has enjoyed property over which he had no title, for the prescriptive period, at the end of the prescriptive period becomes the owner of that property. But such possession and enjoyment must be **nec vi nec clam, nec precario**. This kind of prescription operates not only as an investitive fact but also as a divertitive fact. So prescription is of two kinds 1) Positive or acquisitive prescription and ii) negative or extinctive prescription.

(Space for Hints)

**(i) Positive or Acquisitive Prescription**: The prescriptive period confers a right on the person who enjoyed that property for the prescriptive period. If I walk across your land, where no grant exists, for twenty long years, at the end of this prescriptive period, I possess the right of way. In this kind of prescription, efflux of time confers a right.

**(ii) Negative Prescription:** A time barred debt. But so far as this claim is concerned, time merely extinguished the right of action and not the right itself because even after a very long period of time part payment of the debt or mere acknowledgement of it will revive the right of action. Efflux of time merely reduces a perfect right to become imperfect by extinguishing the cause of action. This is important negative prescription called limitation of actions.

But where an adverse possessor takes adverse possession of land and continues in possession for twelve years, the possessor's possession ripens into ownership, and the owner loses absolutely his right of ownership. This is perfect negative prescription because nonce the right is extinguished there is no question of the right of action surviving.

**Justification for the law of limitation and prescription:**

You must now be aware that it is possible for debtors evade payment of their debts and trespassers to become owners of property; so the law justifies the law of limitation.

Firstly, the presumption of the law is in favour of possessors as already seen. The possessor is presumed to be the owner and in nine cases out of ten the possessor happens to be the owner. So it is said possession is nine points of the law. So in the absence of proof either documentary or evidence of witnesses, continuous possession over a long period of time has to serve as proof of good

title. Secondly, it is justified on grounds of public policy. Ownership of immovable property is such a valuable right that it must not be allowed to remain for a long time unascertained as to cause law and order problems in society. Litigation and infinitum has to be prevented and the law of prescription does it effectively. Thirdly, where a person has slept over his rights and suddenly wakes up and finds a trespasser to have prescribed for himself a right over his property and rushes to the court, no court will help him: for the maxim of the law is **vigilantibus non dormientribus jus a subvenient** i.e. laws come to the assistance of the vigilant not of the sleepy.

**8.6.3. Agreement:** Agreement by itself does not transfer property. It must be accompanied by tradition i.e. delivery, either actual or constructive. Delivery occurs when the transferor points out the thing to the transferee and authorizes him to take it. Delivery also occurs when the transferee or acquirer is already in possession of it and the transferor merely makes a declaration that the acquirer is henceforth its owner.

So, we generally say, by agreement property from one person can be transferred to another. When existing property is transferred, it is called an assignment e.g. assignment of an already existing lease. When property is created for the purpose of transferring it, it is called a grant e.g. creation a new lease and granting it to the lessee.

The law says, whatever may be the nature of the agreement by which property is acquired by the acquirer, by a grant or an assignment, the transferee cannot get higher title than what the transferor had the maxim is nemo dat quod non habet.

**But to this general rule, there are two exceptions:** 1) brought about by the separation of legal from equitable ownership. In an agreement for sale in equity, the intending purchaser is the equitable owner, and seller continues to be the legal owner, but this legal ownership is coupled with an obligation to transfer it when the purchaser fulfills his part of the agreement. So the legal ownership is encumbered with a trusteeship to hold the property in trust for the purchaser. But the seller can convey an unencumbered title to a third party provided the third party purchases the property for consideration and without

notice of the prior equitable right in the purchaser. This is the equitable doctrine of purchase for value without notice.

iii) The second class is where the possession is in one and ownership in another. A mere possession under certain conditions can give the ownership itself to a third party provided the third party deals with him in good faith believing him to be the owner. A finder of a bank can pass title in the bank note to another or a mercantile agent who had no authority to sell the goods, can pass the title to the good to third parties provided the above condition is satisfied.

**8.6.4. Inheritance:** Property is of two kinds inheritable and un inheritable. Rights to inheritable property are merely divested by death, they are not extinguished they pass on to the legal heirs or the legal successors' whereas right to uninheritable property are not only divested by death of its owner but extinguished. Generally proprietary rights are inheritable and personal rights uninheritable. But there are certain proprietary rights which are un inheritable such as, a pension, a life estate, a right of maintenance. Titles of hereditary nobility with its accompanying privilege though personal are inheritable.

When a man dies, all his inheritable right and liabilities vest in his legal representative. He may be a man appointed by the dead man himself by will, or in the absence of a will by the law, in accordance with law of intestacy. These legal representatives of the dead man calls in assets of the deceased, discharges the liabilities if any and distributes the residue among heirs of the deceased. Thus the heirs acquire property. It is by testamentary succession (extestamento) if the distribution is in accordance with the last will or testament of the deceased; or intestate succession (ab intenstato) if there is no will, and the distribution is in accordance with the law of intestacy.

Although generally the last will or, testament of a testator is given effect to, yet while making a will the testator should remember three restrictions imposed upon him by the law.

**8.6.5. Limitation of time:** A dead hand will be permitted to regulate the devolution of property only for specified period. At the close of such period the property must vest in one or more persons absolutely. This is what is called the rule of perpetuity. The rule of perpetuity states, property can be given to any

(Space for Hints)

number of existing lives and to one unborn person, but when the last life estate comes to an end, this unborn person, must have been born and it must be so provided that when he attains majority the property must vest in him absolutely, where the provision offends this rule then in English law the will is completely void, while in Indian law only the excessive period is void.

**Limitations of amount:** Only a portion of the property can be dealt with by him, the rest is left to his dependants.

**Limitations of purpose:** A testamentary disposition which is going to withdraw property from the uses of the living or tends to waste property or to be used for illegal or immoral purpose will not be recognized. So provisions to bury money, or to throw into sea, or property to be used for maintenance of a single tomb will not be enforced.

## 8.7. THE LAW OF OBLIGATIONS

Meaning of the term obligation: According to its first meaning, an obligation means a legal tie or a **vinculam juris** which binds together two or more determinate persons. So obligations create rights in personam. So it includes duties to repay debts, to perform contract and pay compensation for a tort. In a second sense, an obligation means not only a duty but the corresponding right also. So a creditor owes an obligation (a right) and debtor has incurred an obligation (duty). Thirdly, obligation pertains to the sphere of proprietary rights in personam. Lastly, an obligation is a chose in action.

**8.7.1. Soldiary obligations:** In an ordinary obligation there is only one creditor and one debtor. But in a soldiary obligation there are more than one creditor or more than one debtor. Where there are several creditors, they own the debt either as joint owners or owners in common as the case may be. But where there are several debtors as where two or more have jointly committed a tort, or the liability of a firm of partners or there is a principal debtor and one or more sureties, in all such cases the creditor is not bound to divide the debt into as many parts as there are debtors, for he can claim the whole of the debt from anyone of them, as each debtor is bound in **solidum** (for the whole) and not bound **pro rata part** (for a proportionate part). But as there is only one debt once

**Check Your Progress**

7. What is a Soldiary obligation?

(Space for Hints)

it is paid by any one of the debtors, all the debtors are discharged of their liability towards the creditor. (The debtor who discharged the debt can get contribution from the co-debtors for their proportionate share of the debt). Such an obligation is called a solidary obligation.

So a solidary obligation is defined as one which two or more debt or owes the same thing to the same creditor.

**8.7.2. Kinds of solidary obligation:**

**a) Several:** There is a principal debtor A, and surety ship of one or two sureties say of B and C subsequent origin and independent of the creation for the debt guaranteed. Here there are as m any cause of action as there are debtors. There is a distinct and independent vinculum juris between the creditor and each of the debtors. But as the subject matter of the obligation is the same, performance by one of them, will discharge all of them. But release given to one of them will not release the others.

**b) Joint:** When the principal debtor and the sureties sign a joint bond such that the liabilities of each for the debt has only one origin. There is only one denbt and one vinculum juris which binds all the debtors jointly to the creditor. Here there is only one cause of action such that a release given to one will release all the others because when the vinculum juris is severed as to one it is severed as to others also.

**c) Joint and Several:** When two or more sign a bond and make their liability joint and several; or the liability of two or more who have jointly committed a tort, such an obligation is treated as several, for a release given to one does not release the others, only performance will release all, and it is treated as joint for the creditor can bring one action against all the debtors.

**8.7.3. The sources of obligations:** In English law and following that in Indian law the following are recognized as sources of obligations.

a) Contractual, b) Delictual, c) Quasi-contractual, d) Innominate.

**a) Contractual:** As agreements are only between determinate individuals, they always give rise to rights in personam.

**Check Your Progress**

8. What are the sources of obligations.

(Space for Hints)

**b) Delictual:** These obligations arise when a tort is committed by a breach of duty imposed by law, and the tortfeasor has the obligation to pay damages for the injury caused. It gives rise to a right in personam. This is only a secondary right which has arisen because of the breach of a primary duty or a primary right which is a right in rem.

**c) Quasi-contractual:** These obligations also deal with duty, on a breach of these duties a man is dealt with as if he is bound by a contract; though in reality and in fact no contract was intended. So we may say these quasi-contracts are contractual in law, but not in fact.

These quasi-contracts fall into two classes: i) A judgement and decree create an obligation. Then again money paid under mistake; the liability of parents for the necessaries of a child or that of a husband for the necessaries of the wife fall within this class of quasi-contracts.

In the second class fall those which are really torts but the law permits the victim to waive the tort and sue in contract instead e.g. conversion of another's goods. The fiction here is the wrongdoer is treated as an agent of the owner for the purpose of selling those goods and therefore, obliged to reimburse the owner to the extent of the sale price.

**d) Innominate:** All obligations not covered by the first three classes, fall under this class. Obligations of bailees towards bailors, of trustees towards beneficiaries fall under this class.

## 8.8. SUMMARY

In this unit we have studied about the two types of theories of property, one attempts to explain how property came to be to describe the facts; the other passes an ethical judgment on those facts and attempts to justify or condemn the institution of private property Sometimes, however these two aims are combined. On the basis of this we have discussed various theories regarding property and also seen modes of acquiring properties. Then we have discussed the Law of obligation and kinds of obligation in this lesson.

## 8.9. KEY WORDS

| | | |
|---|---|---|
| Inheritance | – | to receive as a right |
| Lien | – | right a particular thing to retain |

## 8.10. ANSWER TO CYP QUESTIONS

| | |
|---|---|
| For Question No 1 | - Refer section 8.2.1 |
| For Question No. 2 | - Refer section 8.2.2 |
| For Question No. 3 | - Refer section 8.2.5 |
| For Question No. 4 | - Refer section 8.3 |
| For Question No. 5 | - Refer section 8.4 |
| For Question No. 6 | - Refer section 8.5 |
| For Question No. 7 | - Refer section 8.7 |
| For Question No. 8 | - Refer section 8.7.3 |

## 8.11. MODEL QUESTIONS

**A) Long Answer Questions**

1. State the meaning of the term property and explain the various modes of acquiring property with suitable illustrations.
2. Define solidary obligations and explain the different kinds of such obligations.
3. Explain five immaterial forms of property.

**B) Short Answer of Questions**

1. What are the kinds of obligation?
2. What is meant be Positive and Negative prescription?
3. Write a note on the following
   a) Servitude
   b) Positive Easements
   c) Negative Easements

(Space for Hints)

# UNIT - 9

# ANCIENT LAW

## INTRODUCTION

Sir Henry Maine one of the greatest jurists the world has seen and the author of ancient law, propounded the theory of religious origin of law. There can be no doubt that the theories propounded by him are based on historical facts. He was not only a historical jurist interested in the evolution and growth of laws, but also a comparative jurist whose theories cannot be brushed aside lightly. In this lesson we are going to study the Ancient law in detail

## OBJECTIVE

In this lesson we are going.

- To know about evolution and history of Ancient Law.
- To know about the period of development of the Ancient Law
- To understand the development of Law of contract, Criminal Law etc.,

## STRUCTURE

9.1. Evolution of Law

9.2. Historical Development of Law

9.3. Period of conscious Development

9.4. English and Roman Equity compared

9.5. Genesis of State

9.6. Evolution of Criminal Law

9.7. Ancient and modern ideas on Will

9.8 Theory evolution of the concept of private property

9.9. Early history of contract

9.10. Law of persons in primitive society

9.11. Summary

9.12. Key words

9.13. Answer to CYP questions

9.14 . Model questions

(Space for Hints)

## 9.1. EVOLUTION OF LAW

Maine in his study of the various systems of law of the Greeks, the Romans, the Hindus, the Mohammedans, and other Asiatic, African and European systems, he discovered that religion had contributed a great deal to the development of early laws, that the rules that governed early societies were legal, as well as religious in nature. The ancients drew no distinction between rules of religion, ethics and morality on the one hand and legal rules on the other and the distinction were a product of subsequent stages of recorded law, literally from China to Peru, to which, when it first emerges into notice is not seen to be entangled with religious ritual observance. The members of such a society consider that the transgression of a religious ordinance should be punished by civil penalties, and that the violation of a civil duty exposes the delinquent to divine correction.

Prof. Diamond another historical jurist, is very critical of this theory. He opines that the theory of Maine is not based on historical facts. He says that religious rules do not contain any admixture of rules of conduct regulating the conduct of man towards man and where in religious sanctions are prescribed for their enforcement. He wrote the religion of savages is concerned chiefly with ceremonies calculated to gain the good will of supernatural powers, ancestors and fellowmen; it is not concerned to afford sanctions for rules of conduct between man and man. Diamond points out that some of the ancient codes such as the code of Hammurabi (B. C 1500) and the Anglo-Saxon laws of Aethelbort (600 B.C. ) are only secular laws with secular sanctions. As for the religious sanctions for civil rules found in the code of Manu, the Mosaic law of the Hebrews and the Twelve tables of Rome, he thinks they were due to the tampering of the laws by the priestly classes, who had their own ends to serve.

(Space for Hints)

But the question is, how far is this criticism sound? It will be remembered that these people to whom these codes belong, had at the time their laws were codified, reached a high degree of civilization and it is suggested that at a still earlier time these people entertained a notion of law in which there was no distinction between civil duties and religious duties and that codification was undertaken for the sole purpose of having a code made up of only civil rules with civil sanctions.

If we take Hindu law, there are classical examples which point out that even until recently there were many rules based on religion for example, succession to the property of a Hindu in the Dayabhaga school depended upon the competence to offer pindas (ball of rice) to the deceased ancestor; the pious obligation of a son to discharge the debts of his deceased father in order to save his father suffering in the next world.

Dr. Dean Roscoe Pound, the American jurist who founded the sociological school in America hold that in the infancy of the human race, in those stateless communities when there was no political power to keep people together, the only cohesive force was religion, and as the notion of law can arise only in an organized society, it must be posterior to ideas of religion and morality. So it is hardly surprising the obligation and ethic should be the basis for a very much latter development, that of the state. So we find that Maine's theory cannot be lightly brushed aside as historically false.

## 9.2. HISTORICAL DEVELOPMENT OF LAW

To Maine there are two distinct periods into which the history of law can be divided. A period of spontaneous growth and a period of conscious growth.

**1. Period of Spontaneous Growth:** In this period we come across three epochs or eras, in this historical order. They are the following:

> **Check Your Progress**
> 1. What are the Advantages of timely code?

**2. Era of Themistes or Judgement:** In the early states it was the king who decided disputes. The awards that he gave were called themistes, because it was assumed that these awards were being given by the king. So there is the germ of a custom, in that line of similar awards must have resulted in the emergence of a customary practice observed by the entire community. After a

long period of time these customary practices must have emerged as customary law.

Gradually monarchical power decayed to be replaced by powerful oligarchies not only in the European countries, but also in the Asiatic communities. In the east the priestly classes assumed political character and these aristocracies become the sole repositories and administrator of law. Towards the en of this epoch they had become so powerful that they began to tamper with the law, because it was unwritten law.

**3. The Era of the Ancient Codes:** From the era of customary law we step into the era of ancient codes the most famous being the twelve tables of the Romans.

At this time writing was invented and it was felt that laws should be codified and written down, instead of being confined to the recollection of a corrupt aristocracy, who were tampering with the law. So laws begin to be inscribed on tables, and published to the people in the form of codes. Though the ancient codes did not more than to codify the existing law and there was no attempt at classification or clarification or separating the civil law from religious rules, yet they were extremely valuable for the publicity they afforded; and the common man came to know the laws of his country.

**Advantages of timely code:** One advantage of a timely code was because they were reduced to writing and published to the people, in the form of codes it prevented further manipulations and perversions of the law by the priestly classes; and the tremendous progress in every walk of life made by the Romans was attributed to this. So the advantages enjoyed by the Romans because of a timely code are compared to Hindu society and it is the contention of Maine that the cruel absurdities and monstrous inequities found in ancient Hindu law are due only to the want of a timely code. He remarks: The fate of the Hindu law is in fact the measure of the value of the roman code.

The Roman Code referred to here are the twelve tables and these twelve tables are compared to the code of manu called the manava Dharma Sastra.

(Space for Hints)

Within three centuries of the founding of the Roman state. Rome reached a high degree of social and political evolution and its legal system had become a very mature system. This, Maine attributes to a timely code. To him the Hindus were not so fortunate because the priestly classes had ample time to prevent the law and even the code of Manu does not represent a set of rules actually administered in Hindustan, but it is, in great part an ideal picture of that which, in the view of the Brahmins, ought to be the law.

To support his theory Maine takes up certain customs of the Hindus and attempts to show the cruel absurdities introduced into them to serve the ends of Brahminical expositors.

**1. Position of women:** To Maine the unwritten law of the Hindus provided for an absolute estate for a Hindu widow but because the law was not codified sufficiently early the priestly class was able to prevent the law, reduce her interest to a life estate on the ground, that the wealth of a Hindu is to be used only for religious purposes, and as a woman is not competent to perform religious sacrifices her succession was frowned upon.

But this criticism is not fair. No doubt the Sastras provide for an absolute estate but that absolute estate was reduced to a life estate only by the Privy Council in order to please conservative opinion among the Hindus.

**2. Custom of Sati :** This custom had its origin in religious customs. By this custom widow is bound to end her life along with her husband by jumping into the funeral pyres of her husband. It is an unfair practice which is being supported by the sastras.

**3. Practice of Niyoga :** This is an ancient Hindu custom which enables a widow who is childless, to raise children for her deceased husband by an appointment. This custom did exist and was practiced and it was recorded in Manu's code, but it was condemned by Manu and other writers of repute.

**4. Rule of spiritual benefit in the law of inheritance :** In the Dayabhaga school which prevails only in Bengal, succession was determined by competency to offer pandas or religious sacrifice to the deceased or a common ancestor, yet in the Mitakshara school which prevails in the rest of India it is propinquity or blood

(Space for Hints)

relationship to the deceased owner and not spiritual benefit which regulates succession to property. Maine committed this mistake because he was not well versed in these customs.

**5. Institution of caste:** To Maine, caste system had a religious origin.

But that is not true: The caste system had been founded on socio-economic considerations and a timely code would not have averted caste system.

6. To Maine, Manu's code does not portray truly the customs of the time, it is only an ideal picture as to what the law should be.

But this criticism is groundless because Manu in his code has faithfully depicted what was the law at that time, for example, Manu did not approve of intercaste marriages, but the set forth in his code the ceremonies for an anuloma marriage, (bride belonging to a lower caste) and prescribes rules that regulate the right of the issues of such marriage. Manu did not approve of widow remarriage; but still recognizes the son born to a remarried woman. Manu reprobated the custom of niyoga, yet prescribes the rules under which it could take place. Manu has recorded all the forms of marriages, the blameless as well as the blameable he recommends the former and recommends avoidance of the latter forms. So all this clearly shows that he has given a true picture of the customs of the time.

Inspite of all this, the fact remains that where the Romans were concerned they did reap the benefits of a timely code, and their legal system developed to suit the changing needs of their society.

## 9.3. THE PERIOD OF CONSCIOUS DEVELOPMENT

Once primitive law is codified, there is no further growth of the law spontaneously. There after there can be only conscious development of the law especially in dynamic and progressive societies to fill in the gaps between existing law and the social need of the society. Manu mentions in their historical order three agencies or instrumentalities as he calls them and which help the legal system to grow and develop. These are – a) Legal fiction, b) Equity and c) Legislation.

**Check Your Progress**

2. What is meant by Leal fiction?

(Space for Hints)

**Legal fiction:** Legal fiction was used both to develop the procedural and the substantive rules of law.

The courts of Rome could be availed only by Roman citizens. As Roman Empire expanded and with it trade and commerce there was an influx of large number of aliens into Rome and it became imperative that they too were given the benefits of the procedure. So the courts used a fiction to get jurisdiction over non-citizens also by allowing a non-citizen plaintiff to aver in his plaint that he was a Roman citizen and the defendant was not allowed to traverse this false averment.

English law has also instances of this class of fiction thought not Hindu law. The court of exchequer which had jurisdiction over revenue matters got jurisdiction over civil matters by resorting to the fiction that the plaintiff was the King's debtor (when he was no such thing) and could not pay his debts because of the fault of the defendant, who owed him money and who if he had only paid up would have enabled the plaintiff to repay the king. The Kings Bench which had originally only criminal jurisdiction in order to usurp the jurisdiction of the court of common please resorted to the fiction that the defendant was in the custody of the king's marshal for a breach of the peace and so being in custody could be made to appear to answer the plaintiff's cause in the court of common pleas, so the plaintiff files his money suit in the court of the King's Bench.

As far as rules of substantive law were concerned, legal fictions played an important role. There was superstitious fear of openly changing the existing law as it was connected with religion but there was on the other hand urgency to encourage the growth of the law.

So the fiction employed by English judges was that they merely declared the existing law, but behind this facet, the law was deliberately modified, repealed, subtracted from and added to.

In Rome the Jurist consults, those learned in the law used to expound and explain the Twelve Tables. They were supposed to interpret the law. The people used to ask these learned jurists questions about law and their meanings and they used to answer those questions. All the answers when collected were called

Respo so Prudentum (Answers) and these answers of the juris consults had really created a variety of rules which helped in the development of the law. In Hindu Law, adoption and the rights and duties created thereby is only a fiction of the law. A child in utero is treated as a person born for many purposes, only by a fiction.

In modern law, constructive possession, constructive fraud constructive trust are all fictions. So the days of fiction are not yet over. History of English Equity: By the late Middle Ages the law was inadequate to suit the needs of a progressive society. Its rules were scanty and its writs few and rigid; its remedies hardly giving any relief to the harassed litigants, and the king had not yet emerged as a law giver. So started the practice of petitioning to the king as the fountain of justice to do justice. The king passed on these petitions to his chancellor, as the keeper of the king's conscience to meet these demands for justice and fair play.

In 1349 under the reign of Edward III, the Chencellor began to sir as a separate court of justice called the chancery court. In the beginning the chancellor was unfettered by rule and precedent, he was not even bound by the previous decisions of this court. Every case was adjudged on its own merits applying principles of equity, good faith, good conscience and natural justice. But this state of affairs very soon in the eighteenth century turned for the worse. When the ecclesiastic court was replaced by a trained man and under the new doctrine that the chancellor is bound by the earlier decisions of his court, equity or chancery law became as rigid and stereotyped with predetermined rules as common law that it was found unnecessary to have two rival systems of law and hence was passed the judicature Act of 1873, which merged the two systems.

But its great advantage over common law lay in the fact that it took into consideration the hardship that would be caused in individual cases; it was flexible law, it was equitable law and it created many kinds of remedies unknown to common law such as specific performance, rectification and discovery of documents, injunction etc. It also great life in cases of uses, trusts, fraud, accident, mistake, breach of confidence and in other inequitable dealings generally. As common law stressed on form unless there was

(Space for Hints)

documentary evidence common law could give no relief but equity based on good faith and good conscience gave relief. Supposing money changed hands because of mistake or fraud, only equity was helpful. So too in case of Trust and uses. Equity came to recognize equitable ownership as well. So beneficiary got equitable or beneficial ownership over the trust property with its attendant rights. In the early days a married woman in England had no right to private property, her downer became that of her husband so he was legal owner and could do anything he pleased with it under the common law maxim, the husband and wife are one in the eye of law and that one the husband. But equity evolved the doctrine of uses by which if property was given to the woman for her own use then in equity she became the equitable owner with certain right over it, in case the husband, the legal owner did not use the property for her use.

History of Roman Equity: The post of Practor Peregrinus was created to deal with the non citizens of Rome. They had to have a body of law, as the civil law of Rome could not be applied to them. So the practor Peregrinus built up rules, based on usages and general principles of justice and fair play common to Rome and the different traces to which they belonged. This was Jus Gentium, a law which could be applied to mankind, and this became the equity of Rome, which was gradually incorporated into the civil. Law of Rome. Ultimately Emperor Hadrian gave permanence to these rules in his Edict called Edict called Edietum pe petum.

## 9.4. ENGLISH AND ROMAN EQUITY COMPARED

Points of similarity i) Both English equity and Roman equities were to supplement and correct the existing law. So they are fragmentary and supplementary in character ii) The claim of superiority over the old law in ethical content as being based on principles of justice, good faith and good conscience iii) In course of time both became the ordinary law of the land iv) Both became in course of time rigid and inflexible.

Dissimilarities i) Acquitas was more flexible as it was contained in Edicts which had only a year's life span and so mistake could be easily corrected. Equity was pure case law and its mistakes could be rectified only by a superior court ii) The Roman Preator could roam where he liked and introduce into

(Space for Hints)

acquitas comprehensive changes, but the chancellor had to confine himself only to the facts of the case before him and the rule framed by him could suit only the case before him. iii) Acquitas confined itself only to testamentary and intestate succession but equity created rule of law and provided many remedies. iv) Early chancellors were ecclesiastics and equity was based on Christian ideals, but the Preators were never church dignitaries. v) Acquitas was evolved because of aliens but equality only because the citizens themselves found the common law unsatisfactory. vi) Acquitas was administered by the same court as the jus in civil or the civil law of Rome, but equity was administered in a separate court, the court of chancery.

**9.4.1. Legislation:** Very soon it was found that neither fiction nor equity were able to fulfill legislative functions with that tempo required by a dynamic society. It was that legislation alone could fulfill this function. So is resorted to legislation, involves a deliberate, undisguised and straight forward alteration of law. Today legislation as a source of law tends to supersede judge made law and customary law, and is almost the sole source of law.

Roman law was virtually codified law and the remarkable fact is that there is a code both at the beginning of Roman history and at its end as well. So Sir Henry Maine remarks. The most celebrated system of jurisprudence known to the world begins as it ends with a code. It begins with the Twelve Tables in 450 B.C. followed by the response prudentum jus practorium. Jus Gentium, imperial legislation and justinian's codifications, the corpus juris civili of 544 A.D.

**9.4.2. Law of Nature :** The law of nature which to the Roman was dead law has hardly lost its significance in the highly developed modern materialistic states of today. The important role it played through the centuries need discussion.

**Greek Theory :** The physical universe which we call nature consists of diverse animals, plants, everything differ from species to species yet there is a uniformity beneath this diversity. The law of growth and decay are universal law of nature applicable to the whole physical universe. So Maine observe, on its simplest and most ancient sense nature is precisely the physical universe looked upon in this way is the manifestation of a principle.

**Check Your Progress**

3. Explain the Greek Theory of Law of Nature.

(Space for Hints)

But not physical universe alone is governed by an universal law, but event he thoughts, observances and aspirations of men even though there is diversity, yet underlying in uniformity of appetites passions and customs ased upon a conviction of what is right possessed by every race. So the Greeks added to this physical world a moral world, and held that to live according to nature was the highest form of life i.e. to rise above the disorderly habits and gross indulgences of the vulgar to higher laws of action which is nothing but self command would enable the aspirant to observe.

When Rome Conquered Creece this Greek philosophy took root in Rome. That the law of nature should fulfil a legislative function was developed by the Stoic School of Greek Philosophy, that the law of nature which is the Jus naturale based on the quality of man and justice equiality and fairness should be the highest, ideals has gone a long way mitigating the rigour of the law correcting its deficiencies and always remaining an ideal for legislators and jurists, it is equated with the law of God.

**At Rome:** At first that man is born equal made no impact on the Romans. It was the praetor peregrinus who was able to base his law on his equitable principle of morality and justice. So the jus gentium was the nearest approach to the jus nature of the philosophers and the terms are sometimes used to mean the same: So Maine observed The jus naturale is simply the jus gentium seen in the light of a peculiar theory" The peculiar theory is the stoic philosophy, which propounded that the law of Nature is the source of morality and since it is prescribed, Divine Reason, the true foundation of all civil law.

It is because of jus gentium like the jus naturale was based on the principles of morality, reason and customs common amongst the nations of the world and was created by natural reason, the same as jus naturale, that one is identified as the other.

But inspite of this observation of Maine, the two has gentium and jus naturale are not the same. There are quite marked distinctions between them.

Points of Distinction i) The law of nature was only an ideal law but the jus gentium was a body of legal rules founded on the law of nature and administered in the courts, in the administration of justice, while the former is a part of the

eternal law, the latter is a part of the positive law of Rome (ii) Salvery was contrary to nature, but recognized by jus gentium. (iii) Once citizenship was conferred on all subjects of the Roman Empire Jus gentium disappeared but jus naturalie, the eternal law continued to influence the moulding of law.

**Middle Ages:** The Catholic Church took up this law of nature as the expression of God's will, to justify Church's dominance with the state and its rules.

**9.4.3. Modern History of the Law of Nature:** In the seventeenth century the law of nature ceases to be identified with Divine law and instead plays a vital role in the political theories of the time. The doctrines of natural rights became the more potent of political forces in the modern world. It became the ally of freedom and weapon of attack against tyranny. As Robson has observed: Through the doctrine of Natural rights, the concept of the law of nature which had been for nearly two thousand years a harmless maxim almost a common place of morality, became at the end of the 18th century a mass of dynamite which shattered an ancient monarchy and shook the European continent: all men are equal a juridical idea became a political dogma. All men ought to be equal in the hand and Rousseau, which led to that holocaust the French Revolution. It claimed for all men liberty, equality and fraternity.

Law of Nature and International Law: The stoic philosophy of the law of nature influenced the development of international law. Grotius, the father of international law, applied the principles that all men are equal and man's natural impulse is to respect others, to a law between sovereigns. So the main postulates of Grotain international law are not to interfere with what belongs to others, to abide by agreements and to fulfil promises; to repay damages done to another even when they are at war.

Europe was torn with war and horrors of war created a feeling that such rules should be accepted and Maine does not exaggerate when the says, that the greatest function of law of nature was discharged in giving birth to modern international law and to the modern law of war.

The fundamental postulates of the Grotian theory were; that international law binds only sovereign stages and not any person of the community that

(Space for Hints)

however different in power and resources they are all equal in the view of the law of nations, that as they cannot be bound by positive law, they can be bound only by natural law.

## 9.5.GENESIS OF THE STATE

Theories Regarding the Origin of the State: Questions have been asked as to how a state organization with a central authority came into existence and who gave this central authority, its power and why men should obey its dictates. To answer these questions two major theories have been propounded.

1. The social compact or the social contract theory, and
2. The evolutionary theory

**1. The social contract Theory:** According to this theory the origin of a state is supposed to be the outcome of a social compact or contract. The most famous exponents of this theory are Hobbes, Locke and Rousseau.

**Hobbes:** Before a state organization came into existence man lived in a state of war, where might was right. So man's life was short, nasty burutish. There were no arts, no letters, but continual war and danger of violent death.

But man being a reasonable creature, soon discovered for himself that without an authority to keep them in awe, life could at best be uncertain. So then on one fine day, they entered into a contract among themselves, and appointed a man to rule over them. They surrendered their natural right to do what they liked and bestowed all power on single man or body of man called the sovereign. What they lost in liberty they gained in security.

**John Locke:** Locke also postulates a state of nature but his state of nature is eminently social in character, governed by the law of nature, or reason. But as the intelligence of men are different there is uncertainty and in order to escape such uncertainty state is established by means of a contract. But unlike the contract of Hobbes this contract is triumph of reason than of hard necessity. The contract of Locke is a contract of each with all, a surrender by the individual of his rights in return for the guarantee that his right as nature ordains them will be preserved.

**Check Your Progress**

4. Write a note on social compact theory?

**Rousseau:** To Rousseau the state of nature was a golden age of freedom, but the necessities of self-preservation and the jealousies that arose after the institution of private property brought about violence in society, so they entered into a contract by which they surrendered their rights, not to an individual but to the community as a whole for the general good of the whole. The community or general will is no party, to the contract and is therefore sovereign, and the actual ruler is the servant of the general will.

**Criticism: Firstly:** None of these theories are based on historical facts. They are based on speculative reasoning and to justify the stand that they took in contemporary politics, Hobbes support of Stuart's absolutism, said that the sovereign is not a part of the contract and his power cannot be questioned. To Locke, the prince or monarch is only a trustee and can be deposed by the people, so justifies rebellion. He supports the banishment of James II and that accession of William III. He is an upholder of a system of limited constitutional monarchy. As for Rousseau's theory, the sovereign is only a delegate of the general will. He is a believer in unlimited popular sovereignty. his attack is against the French aristocracy and the then prevailing conditions in France and elsewhere in the world, where the common men lived in seldom and with the basic rights.

Secondly there is no record of any kind to show that a government was instituted by a compact, and a compact also presuppose that everyone in the community was an adult capable of understanding what he has promised in return. The theory is groundless and mythical.

Thirdly a contract is only a product of positive law, so how could there be notions of contracts and contractual in primitive stateless societies. If the sovereign was bound in religion then such a duty proceeds from divine law and not from the pact itself.

Sir Henry Maine criticizes this theory, as the concept of contract is of very late origin. There is historical evidence to this fact. So the social contract theory is a violent anarchronism is also a historical fact that in primitive societies, even when state organizations had come into existence, the position of individuals was not fixed by contract but had it fixed for them by the status into which they were brown. He became a slave or a servant because he was born so,

(Space for Hints)

not because be agreed to became one. So status and not contract was the basis of primitive society. When the idea of a contract emerges, contractual capacity is available only to the heads of families who could enter into contract among themselves and that is because the unit of ancient society is the family and not the individuals.

**9.5.1. The Evolutionary Theory:** To Maine the origin of the state is a question to be settled not by conjecture but by historical evidence. The Anthropologists Melennan and Morgan have propounded Matrilineal or Matriarchal theory and Maine the patriarchal theory. In order to understand these theories it is imperative to know the nature of early societies and the basis on which these societies were founded.

**9.5.2. Nature of early society:** Kinship is said to be the basis of early societies. According to Maine in the early days of the human race man is found in isolated groups, held together by obedience to the father. When later the sovereign becomes a law giver his command have same nature as the father's commands, so the presumption is that the state was an aggregation of families. Archaic law also suggests this, or in other words it may be said that unit of ancient society is the family of a modern society of the individual. This doctrine Maine traces in every department of archaic law.

**Penal law:** Penal law touched not merely the individual wrongdoer and the victim, but liability for wrongdoing was fastened to the group to which the wrongdoer belonged and it was the vengeance of the group to which the victim belonged. The blood feud of old are characteristic of this. So penal law was concerned with groups and not with individuals.

**Civil Law:** Civil law was very meager and touched only the heads of families, also the jurisdiction of courts reached only the heads of families.

> **Check Your Progress**
>
> 5. Write a note on Evolution theory of modern state.

**Law of Contract:** Even when the concept of contract emerged the position of individuals was determined by status, summed up in Patia Potestas or paternal powers. So heads of families could contract with heads of families, more particularly because the individual had no right to property. Property belonged to the family. Gradually the individual got rights to property and contractual powers to determine his own position in the family and the society at large.

(Space for Hints)

**Law of Property:** *Transfers were ceremonies* to the highest degree. This was because property was owned by families and not by individuals.

**Law of Inheritance:** Succession was only to the headship of families. The entire legal clothing descended to the successor without any breach of continuity.

**Law of Wills:** In ancient law the will was not to regulate the devolution of property. It was only an instrument to enable the chieftain to appoint another head of the family and allowed to take effect in the absence of a natural heir.

So from all this it is quite clear that Maine's theory that the unit of ancient society, is the family and not the individual, is quite sound.

**Patriarchal theory:** Having seen that society, wax an aggregation of families the next question is what was the nature of the family which formal the nucleus for the society. Maine's contention is that this family was patriarchal in character, namely, the families that formed the society could all trace their descent to a common male ancestor through a direct male line and in which authority rests in the oldest living male ascendant.

This is not modern theory. The writings of Plato, Aristotle, Homer and the Bible speak of patriarchal families. The Roman family, as well as the Hindu joint family are all patriarchal in character.

To Maine a woman could be the head of the family, for it was multer est finish famile i.e. a woman was the terminus of a family. Before marriage she was always under the protection of her father. After marriage she went out of this protection, then she and her children fell under the protection of her husband's agnate family.

**9.5.3. Evolution of Modern State:** To Maine every ancient society regarded themselves as having proceeded from one original stock, but they were not numerically strong to exercise dominion over a wide territory. So they began to engraft into their society aliens by employing the fiction that they too belonged to the same stock. But as time passed the original stock multiplied and they felt strong enough. They reverted to the strict rule of kinship and treated the aliens

**Check Your Progress**

6. Write a note on the evolution of Modern State.

(Space for Hints)

in their midst as inferiors denying them rights. So those of the original stock became aristocracies.

As they rejected aliens drawn from different tribes and races, they associated together and developed among themselves bounds not based on kinship, but upon common associations in one locality. Thus emerged the Modern Territorial State.

**9.5.4. Matriarchal Theory:** Melennan and Morgan, the great anthropologists, take us back to an earlier group based on kinship through females, because men lived in hordes in sexual communism, without notions of matrimonial relationships. Later the horde established group marriages and various forms of polyandry. And it was only very much later the patriarchal system emerged. This theory is based on observations of aboriginal tribes of Africa, Australia, Madagascar and Eskimos, were descent is traced through females through a direct female line and property also passes through the female line.

But general opinion is that polyandry must have been due to the scarcity of women, because of the female infanticide practiced by many races, and there is no case for sexual commuinism, for that would have led to the debilitation and extinction of many warring savage tribes; which is not true of the Aryan race.

As far as the Aryan or Indo European family is concerned, it was the patriarchal family, the eldest male ruling over it. Then the family broadens into the House or Genes, it is the chiefest Kinsman who rules. The houses from the tribes, the tribes culminate into the state, all ruled by one who can claim kinship to the others. As Woodrow Wilson observes: Historically the state of today may be regarded as, in an important sense only of enlarged family, state is family writ large.

## 9.6. EVOLUTION OF CRIMINAL LAW

**Check Your Progress**

7. What is Matriarchal Theory?

To Sir Henry Maine, The Penal Law of ancient communities is not the law of crimes; it is the law of wrong or to use the English technical word Torte. This does not mean that ancient societies were so orderly that there was no wrongdoing at all, or in other words no crimes were committed. It only means

(Space for Hints)

that wrongs that we today regard as crimes, were all torts to be compensated by the payment of compensation. Even murder and theft were regarded as private wrongs to be bought off by payment of compensation to the injured party.

In Germany if a man was killed, the wrongdoer paid so many sheep and oxen as fine; in the Andaman Islands, murder was an offence left to the individual wronged to take action. In early Roman law theft, assault and robbery could be satisfied by recovery of compensation. But criminal law, in the sense the wrongdoer is punished was confined to the wrongs of treason, murder, adultery, forgery, seeking public office by illegal means, bribery, embezzlement of public money and the like. It may be said that for the first time in the history of legal jurisprudence, Roman law, recognize certain offences to be serious enough to be punished in the name of the state. The rest are still regarded as civil wrongs or torts.

Maine traces the evolution of tort into crime through four successive stages.

**State I :** At this stage, the state has not yet become strong enough even to impose its will on the people and so does no attempt even to administer justice. Redressal of wrongs is left to the individual wronged and his relatives. This is the stage of private vengeance and private justice. The idea is not of individual responsibility, it is group responsibility and therefore the vengeance is that of the entire group to which the victim belongs. So blood feuds were sanctioned, and the prevailing rule was the lextalionis an eye for an eye and a tooth for a tooth.

In Abyssinto even as late as 1899, the relatives of a murdered man had the legal right to put the murderer to death by whatever means he employed towards their kinsman; or if they prefer accept a money payment instead.

**Stage II:** Notions of criminal law emerges at this stage but simply declares the point at which he may use force to require the wrong done and yet remain blameless. The horrors and destructive powers of the blood feuds were such that the state was alarmed, for a community could hardly afford to lose its able bodied men and it was plunging the entire community bloodshed and devastation of the land, because any body could be drawn into these feuds and they became a never ending affair. So at this stage though the state was not

(Space for Hints) powerful enough to stop the blood feuds altogether. Yet insists that it be allowed only to a limited body of blood relations of the victim. The groups themselves came to realize that if they were to survive, they should disassociate themselves from the wrongdoer, so started noxal surrender. The culprit is handed over to the injured party. Individual responsibility for wrongdoing is thus emphasized.

The church is also anxious to put an end to the blood feuds and therefore, comes out with the rule that on holy days and holyseasons like the Sabbath and lent these blood feuds must be suspended. The privilege sancinary is another whereby the wrongdoers take sanctuary in places protected by the church, as a monastery, or church of convent then they cannot be pursued into these places. The church used its good offices, in the interval to persuade the aggrieved party to abandon the feud and accept some compensation.

This stage also marks the period of optional compensation that is at the option of the aggrieved party the feuds could be bought off. But even during this period the state is not powerful enough to altogether stop the feud, it only acts as arbitrator fixing the compensation, *bot* and out of this a part called the *wite* went to state for its services and the balance the *wer* (blood fine) went to the injured party.

**Stage III:** Even during this period, a wrong is still a tort to be bought off by compensation. By now the state is strong enough to put down the (blood) feuds and compel the injured person or party to accept the compensation fixed by the popular assemblies.

**Stage IV:** At this stage the state realizes, that not all wrongs should be bought off by money payments. There are some wrongs serious enough to be punished by the state in the name of the state. So serious wrongs came to be recognized. The idea of punishment now comes to the forefront and that of compensation recedes.

But even at this stage, there is neither general criminal law nor any permanent system of criminal tribunals. Each time a serious offence is committed action is taken through the legislature the comitia centuniata by passing an enactment declaring that offence to be a crime and a special committee of the legislature called the quaestores was formed to try that offence. But later a

standing committee is appointed to try all crimes, which the people feel are serious enough to be regarded as crimes and to be punished. Thus evolved the general system of criminal law and a system of criminal tribunals.

The early history of testamentary succession: The modern will is an instrument of disinheritance and so it is to regulate, the devolution of one's property after death, but not so the early will. To the Romans, succession took the form of Universal succession called universal juris. The entire legal clothing of the deceased descended on his legal heir, when I say the entire legal clothing, it means all rights and liabilities. This heir was the next head of the family. As the property belonged to the family as such, there was no question of distribution of the property. So succession was universal succession. Till the time of Emperor Justinian (6th Century) the heir had to discharge all the liabilities. If needs be even dipping into his own pocket or out of his private property. Inheritance of this type was called, damnose hereditas. The justification of this rule was that the heir was a contipuation of the persona of the deceased head or chieftain, who would have paid up the liabilities of alive, and .secondly, as the family is the political unit of society appointment to the headship is appointment to an office i.e., manager of the family responsible for all the assets and liabilities of the family.

But this hardship was to a large extent mitigated by Justinian by making the liability of the heir limited, provided he took an inventory of the estate of the deceased in the presence of witnesses within six months from the time that he know he had become the heir. This is called the principle of separation bonorum or beneficium inventarli. In such a case the heir or the new head of the family is liable for the debts of the family to the extent of the property inherited.

## 9.7. THEORIES REGARDING TESTAMENTARY SUCCESSION:

Because testamentary succession has become so common now a days many a jurist fallen into the error of thinking that intestate succession is posterior to testamentary succession. To them intestate succession i.e. succession ab intestate was developed later by the legislature for the discharge of a function left

(Space for Hints)

unperformed when the deceased through neglect or other wise did not leave behind a will.

But to Maine, intestate succession was anterior to testamentary succession, he gives several reasons for the stand he took.

(i) It was the Romans who first evolved the will and later it was copied by the Athenians, the Germans and the Jews; and the will is allowed to take effect only in the absence of a natural heir. Ii) In Hindu law, there was no such thing as a will. In the absence of a natural heir, adoption was resorted to which served the purpose of a will. Moreover not only Hindu jurisprudence, but many of the countries of Europe notably Germany made every male child a co proprietor with their father so the will was not necessary iii) In ancient times, the unto f society was the family so death of the pater families i.e. the head of the family did not affect the continuity of the family. The will was not to distribute property but only to appoint a head of the family it was universal succession iv) The earliest form of Roman will was the Testimonium Calatis Committies which could be availed of only by the Roman citizen, so the will was not universal. It was not also informal as it was hedged by formalities.

So all these factors conclusively prove that testamentary succession was a later institution than inheritance or intestate succession.

**9.7.1. General features of the early Roman Will:** The early will did not have the characteristics of the modern will which is secret, revocable and takes effect only after death. The oldest Roman will was made openly before witnesses, and as it took effect immediately it was irrevocable.

As the Testimonium Calaris Committis was available only to the patricians, the manicipatory will was evolved for the plebians. This will was neither secret nor revocable as vesting of the property in the heir took place immediately. It was in the form of the fictitious conveyance in the presence of five witnesses and the libripens, thebalance holder. Gradually by 63 B.C. The manicipatory will superceded the earliest will viz., the testimonium calaris committees. The manipatory will was improved when the purchaser was a trusted friend who had instructions to hand over the property to the heir only on death of the testator The will was also written down, So the will became secret

and as vesting was not immediate but only to take effect on the death of the testator it became revocable.

Now for the aliens a will called the Practarian was developed by developed by equity. Any will which was invalid under jus civile i.e. civil law of the Romans, was given validity provided it was in writing and the document sealed by the seals of seven witnesses. There were no other formalities. But under this will, no ownership could be given to the heir, only possession and enjoyment called Bonorum possessorium or equitable ownership. But if he had been in possession for a full year, then civil law itself gave him the legal ownership on the principles usucapion to prescription. This will was also secret and revocable.

It was in the 5th century that the modern will called the Roman will or Testamentum Tripertium was evolved. It was so called as it had three sources.

1) Like the manipatory will it passed legal ownership and not the bonorum possession (2) It required no mancipation or conveyance like the practarian will 3) By the imperial constitutions the seven witnesses had also to sign the document.

Maine's reasons for invention of the will: To avoid danger of leaving the inheritance without an heir i.e. a head or manager of the family. 2) To provide for emancipated sons, who by great affection were freed from the bonds of the Pater potestas and therefore could not inherit.

## 9.8. ANCIENT AND MODERN IDEAS AS TO WILLS

The modern will is an instrument of disinheritance; if needed it could even divert property from the natural heirs. But the ancient will was to appoint a new chief later on, it came to be recognized as an aid to distribute wealth. The idea that it could be an instrument for dividing the property evenly or unevenly or fairly than the law of intestate succession would have divided occurred only later on. This idea, it is conjecture may be attributable to the influence of primogeniture which disinherited all the children in favour of one.

Primogeniture is a product of the feudal system. The first born male inherits in preference to the younger children and in final primogeniture, the property descends to the eldest male line to the exclusion of junior lines.

(Space for Hints)

Several reasons are given as to why primogeniture diffused throughout Europe with the growth of feudalism 1) As the lands wre given mostly on military tenures, the feudal lords had a better security for the military service he required, where one man was held responsible for the military service due from the family. So the choice naturally fell on the eldest son and along with this burden, the benefit of the inheritance also 2) It was popular with the tenants 3) It was possible to bring order out of chaos of the Middle Ages when power was concentrated in one hand viz., that of the eldest son.

In early days the eldest son held the inheritance in a representative character, with duties towards all the members of the family. But when the feudal period came to an end primogeniture continued, but the eldest son held it to the exclusion of the other children.

This theory of Maine is criticized as Maine did not take note of Ultimogeniture of Junior Rights. During the period of rudimentary stages of agriculture when scrap and grass were burnt for cultivation, once the fertility of the land decreased, the eldest son went further in search of rich lands, leaving the youngest behind who inherited these lands. In England both primogeniture and ultimogeniture flourished side by side and according to Vinegradoff, it had only one cause, the necessity of keeping organic unity of an economic nature.

## 9.9. THEORY EVOLUTION OF THE CONCEPT OF PRIVATE PROPERTY

**Theory of occupancy:** This theory as to the origin of property is quite ancient. In Roman law one of the modes of acquiring property res nullias was by occupation or taking possession.

To Black stone, when a person took possession of a piece of land for rest or shade he got temporary ownership over it. When population increased, out of necessity this possession became perpetual. So the possessor was allowed to become the owner.

**Check Your Progress**

8. What are the four stages of ownership?

Although Savigny supports the theory of occupancy, it differs from Blackstone, in that, to Savigny ownership is adverse possession ripened by prescription. To him, when a man takes possession of land and openly enjoys it

and excludes others for the prescriptive period, then this adverse possession which continues without interruption is ownership. But history does not support this theory of occupancy. We do not know how primitive man lived and whether he respected possession of another or not. Also ancient law as concerned with families and individuals, not had the primitive man any notion of possession.

According to Maine, the evolution of ownership of property had four stages 1) The tribal stage which was supposed to have come after the hunting stage 2) the village community stage 3) the family stage, 4) the individual stage.

**The tribal stage:** The hunting stage had preceded the tribal stage. At this period families had culminated into the tribes. There was no idea of ownership, as nature was bountiful and so the tribes moved from place to place hunting and grazing their cattle.

**The village community stage:** Population increased and nature's boundary had considerably been depleted so the tribes began to settle down in village communities on the patriarchal model, the chieftain being the oldest male. The male members were all cooperators and all descended from the common stock. The land was owned by the community itself. Everything was in common. The harvest also belonged to the community and distributed according to the need of each family. The pattern is the same as in Asiatic communities and the European communities. In some communities, land for cultivation was allotted to the families and at the end of the agricultural season the land was surrendered to the community. The harvest went into the community granary. In yet other communities land as much as needed was allotted to the family to be held and cultivated and enjoyed by the family itself. But there would be periodic redistribution of the land, and no family could claim the same land over again for cultivation.

In Rome too, all immovable property was held in common ownership by the house or gene. The individual family could only own movables such as slaves, cattle and agricultural implements.

**The Family stage:** In course of time families who had improved the land, came to demand, that they be given the same land instead every time there being a redistribution of land. So they succeeded in getting back the land on which they

(Space for Hints) had made improvements again and again until finally it came to be recognized that the family owned it and therefore the land need no more be surrendered to the community. Thus family ownership was chiefly formed by the dissenting element of the separate rights families from the blended rights of a community. Family ownership marks the first stage towards the emergence of private ownership. Another cause for the emergence of private ownership is attributed by Maine to the influx of strangers. These strangers weakened the solidarity of the tribe which actually brought about its disintegration which resulted in family ownership.

Everywhere tin the Russian Mir, the Roman communities and the Germanic Mark began to be allotted in perpetuity.

**The individual stage:** The strangers who were cleanness people had individual ownership of property. That and all the causes that brought about the disintegration of the tribe also operate upon families and weakened the family ties, each son claiming for himself a portion of the family property. This process was accelerated when Patria Potestas decayed and thus emerged individual ownership.

In Rome, individual ownership first appeared when Augustus Caesar introduced the Pecultium castrenie i.e. property acquired by soldier on military service became his own. By the time of emperor Constantine other kinds of property acquired by individuals were regarded as their own. This is the Peculium quasi castrense.

Therefore Maine observes that private property or individual property came into existence by the gradual disentanglement of the separate rights of individuals from the blended rights of a community.

**Alienation of Property in Ancient Law:** As in the early days alienation was by one group to another group of owners, elaborate ceremonies had to be observed.

**1. Mancipation:** This was the earliest form of conveyance in Roman law and the earliest form of property was called Res Mancipi lands house, cattle,

slaves (superior kinds of property) and Mancipation was the mode of transferring them. Mancipation was hedged in with formal ceremonies.

**2. Tradition or delivery:** Inferior kinds of property, the Res necmancipi could be transferred by mere tradition or delivery. As this was a simple form of conveyance, when many types of property came to be recognized as important, in order to avoid manipation, they were added to the list of res nec mancipi.

3. **In jure cesslo:** This was by means of a fiction, a suit before the praetor. The purchaser claimed that the property was his and the seller did not contest. So the plaintiff purchaser became the owner.

**4. Usucapio:** This rule of usucapio to prescription was developed to give the purchaser ownership, when res maniel was merely delivered without mancipatio or in jure cession. If the purchaser had the property for two years if it was immovable and one year for movable at the en d of respective period he became the owner, but later on by the time of Emperor just main the differences between res mancipi and res nec mancipi became obsolete and tradition prevailed over the other forms of conveyance. This is an assimilation of res mancipi to res nec mancipi.

**Property law in Europe:** To Sir Henry Maine, This history of property on the European continent is the history of the subversion of the feudalized law of land by the Romanized law of movables.

Feudalism which led to a sub infeudation to the ultimate tenant who actually cultivated the land introduced a dual form of ownership, the apparent owner, the tenant and the absolute owner, the feudal Baron.

It was suggested by Maine, that this concept was powered by the Barbarian invaders who granted these lands to their followers on military tenures from the Roman concept of Emphytuesis, or permanent or perpetual tenancy of land which was subject to the payment of a fixed rent called the quit rent. The emphyteuta was treated as a true proprietor and could not be ejected so long as the rent was paid, and if ejected wrongly, could get a remedy by a Real Action which was available for immovable property alone, as immovable wee called in

(Space for Hints)

England reality and chattels were personality and could be recovered only by personal action.

The emphyteuta could exercise many of the rights, that an owner has for example, he could mortgage the land, create servitudes and pass it on to his heirs. The grantor's ownership was quite real and alive, but it was only a right of re-entry for non payment of rent.

In England in 1660 military tenures were abolished by converting all these tenures into what were called "Common Socage" tenants were not made to render military service tot heir Lord, but only pay a quit rent. So, land became disposable by will by use of personality, became obsolete and tradition prevailed over the other forms of conveyance. This is "an *assimilation of res mancipi to res nec mancipi'*.

It was suggested by Maine, that this concept was powered by the Barbarian invaders who granted these lands to their followers on military tenures from the Roman concept of Emphytuesis, or permanent or perpetual tenancy of land which was subject to the payment of a fixed rent called the quit rent. The emphyteuta was treated as a true proprietor and could not be ejected so long as the rent was paid, and if ejected wrongly, could get a remedy by a Real Action which was available for immovable property alone, as immovable wee called in England reality and chattels were personality and could be recovered only by personal action.

The emphyteuta could exercise many of the rights, that an owner has for example, he could mortgage the land, create servitudes and pass it on to his heirs. The grantor's ownership was quite real and alive, but it was only a right of re-entry for non payment of rent.

In England in 1660 military tenures were abolished by converting all these tenures into what were called "Common Socage" tenants were not made to render military service tot heir Lord, but only pay a quit rent. So, land became disposable by will by use of personality.

When real actions were abolished in 1833, the Action of Trover was available for both kinds of properties. Only one distinction remained, personal

property devolve on next of kin and real property to other heirs by the custom of primogeniture.

(Space for Hints)

The administration of Estates Act, 1927, abolished heirship. So the distinction of property into reality and personality also disappeared. So after 1925, where the Law of real property Act was enacted, property whatever kind was to be vested on the death of its owner in his legal representative and distributed according to a new set of rules applicable to both kinds of property.

## 9.10. EARLY HISTORY OF CONTRACT

Sir Henry Maine: The positive duty resulting from a man's reliance on the word of another is among the slowest conquests of advancing civilization.

In primitive society, when the notion of a contract makes its first appearance, the breach of an obligation was neither immoral nor illegal, it was only gradually promises were given legal enforcement.

A contract started as an incomplete conveyance. When the thing was conveyed and there was a promise to pay the price, the promise was the contract. So whether the price was paid or merely premixed to pay the transaction was called nexum. Later sale came to be called mancipation and the contract which was a sale on credit the nexum.

In primitive times, the ceremony was given more importance than the promise.

Maine enumerates four contracts in their historical order i) the verbal 2) the literal 3) the real and 4) the consensual.

**Verbal contract:** It was just a question and answer, this is the stipulation. Do you promise this? Yes, I promise. The conveyance was omitted.

**Literal contract:** Writing was invented and the Romans were very good at book keeping. It merely consisted in entering the sum due, on the debit side of the ledger. Even now there is no moral consideration for legal enforcement.

**Check Your Progress**

9. State the early History of contract.

**Real contract:** These show ethical conceptions. A person who had partially performed the contract cannot repudiate the contract on grounds of defects inform. Performance on one side is allowed to impose legal duty on the

(Space for Hints) other. So both legal enforcement and moral consideration appear for the first time.

**Consensual contracts:** There are four kinds: Mandatum commission or agency, societies or partnership, Emtio Venditiot; purchasing and selling; Locatio Conduction; letting or hiring. These are the parents of the modern contracts. The agreement or the consensus of the parties itself has the binding force and is the essence of a contract and external factors serve only as evidence of such consensus.

## 9.11. LAW OF PERSONS IN PRIMITIVE SOCIETY :

Maine illustrated this by discussing the position of children, women and slaves. It has already been pointed out that as the unit of ancient societies was the family and not the individuals so the position of the individual depends on status and not on contract.

The movement of the progressive societies has been uniform in one respect: it has been a movement from sttus to contract.

**Children:** All children were subject to potestos. Even the private earnings of the son could be enjoyed by the father, unit the pecultum castreness and neculium quasi castrence were introduced. It was very much later when patria poteste decayed the son or the fitius gets true independence and powers to contract for himself.

**Woman:** She was under prepetuatutela of her father or nearest male relative. On marriage she went under the dominion of her husband's agnatic family. She could not adjust her position for herself by contract and she could never be the head of family. By the time of Emperor Gaivs she got her contractual independence, also an informal civil marriage called uses came into vogue which allowed her to remain under the potestos of her father even after marriage. During Justinian's reign both patria potestos and along with it perpetua isteia became obsolete and she gets complete independence to regulate her position by contract.

**Slaves:** At first salves were dealt with as chattels to be sold and bought. By the time of Justinian salves could also enjoy epculium. In certain property and

money thought in law it all belonged to the master, gradually this relation between master and slave passed on status has given way to the relation of employer and servant which is based on contract.

**Criticism:** Pollack opines that this theory of Maine is applicable to the law of property and no to personal obligations and personal relations. Marriage today is very much a matter of status and not contract. Minors and other incapacitated persons suffer from partial disability to do contract, thirdly corporations and certain services like the Indian civil service and the rights and privileges incidental to it are matters of status and not contract. Vinogradoff feels that the pendulum has today swung the other way, as trade unions have made the workers into a class. To Dean Pound, much of the law was based on status and not on contract, for instance one did not speak of Law of Agent or contract of Sale, but the Law of Principal and Agent, Law of Vendor and Purchase; Law of Husband and Wife; Parent and child and so on.

Workmen's Compensation Act is not a matter of contract but of status; trade unions have got a status of their own. The law has interfered with the free exercise of the powers to contract where they are concerned.

## 9.12. SUMMARY

Sir Henry Maine one of the greatest jurists and the author of Ancient law. Maine studied the various systems of law of the Greeks, the Romans, the Hindus, the Mohammedans, and other Asiatic, African and European systems, he discovered that religion had contributed a great deal to the development of early laws, that the rules that governed early societies were legal, as well as religious in nature. Maine found two distinct periods into which the history of law can be divided. A period of spontaneous growth, and a period of conscious growth. In the seventeenth century the law of nature ceases to be identified with Divine law and instead plays a vital role in the political theories of the time. The doctrines of natural rights became the more potent of political forces in the modern world. It became the ally of freedom and weapon of attack against tyranny. After this period the growth of Law of wills, Contract Law ,Criminal Law are discussed in this lesson in detail.

## 9.13. KEY WORDS

| | | |
|---|---|---|
| Will | - | A document declaring a person's wish |
| Succession | - | line of descendants |
| Entanglement | - | involve in difficulties |
| Consensus | - | general agreement |

## 9.14. ANSWER TO CYP QUESTIONS

| | |
|---|---|
| For Question No. 1 | - Refer section 9.2 |
| For Question No. 2 | - Refer section 9.3 |
| For Question No. 3 | - Refer section 9.4.2 |
| For Question No. 4 | - Refer section 9.5 |
| For Question No. 5 | - Refer section 9.5.2 |
| For Question No. 6 | - Refer section 9.5.3 |
| For Question No. 7 | - Refer section 9.5.4 |
| For Question No. 8 | - Refer section 9.9 |
| For Question No. 9 | - Refer section 9.10 |

## 9.15. MODEL QUESTIONS

**(A) Long answer questions**

1. The penal law of ancient communities is not the law of crimes it is the l of wrongs (Maine) – Comment.
2. What are the instrumentalities which helped for the growth development of law?
3. Enumerate the various stages of the development of contract acc Maine.
4. "The most celebrated system of Jurisprudence known to the v as it ends with a code" –Maine – Explain.

## (B) Short Answer Questions

(Space for Hints)

1. What are the two periods according to Maine essential for study of History of Law.

2. Write a note on the following

   a) Roman will

   b) Green theory

(Space for Hints)

# UNIT - 10

# COMPARATIVE LAW

## INTRODUCTION

Comparative law is not a kind of law, it is only a comparative method of studying law and it is used to harmonize the different systems of law and to promote unification of law. Comparative law is a method of enriching one's own legal system and understanding it better. In the solution of domestic problems a lawyer may find a foreign system of law to be of some guidance. A study of foreign law is helpful where a lawyer has to advise his own government on international problems. In this lesson we are going to study Comparative Law and its importance thoroughly.

## OBJECTIVES

- To know the history, province and definition of comparative Law
- To know the classification of comparative Law
- To understand the procedure of comparison and
- To analyse the importance of comparative Law in Legal Education

## STRUCTURE

10.1. History and Province of comparative Law

10.2. Definiton of Comparative Law

10.3. The comparative method its aim and purposes

10.4. Classification of Comparative Law

10.5. The value of comparative Law

10.6. Comparative procedure

10.7. Process of comparison

10.8. Comparative Law and Legal Education

10.9. Summary

10.10. Key words

10.11. Answer to CYP Questions

10.12. Model Questions

(Space for Hints)

## 10.1. HISTORY AND PROVINCE OF COMPARATIVE LAW:

During the second world war the nations were drawn closer and increasingly the states have become economically dependent on the other states, therefore the states have began to study the legal systems of other countries and that gave an impetus to the study of comparative law. Comparative law is a method of enriching one's own legal system and understanding it better. In the solution of domestic problems a lawyer may find a foreign system of law to be of some guidance. A study of foreign law is helpful where a lawyer has to advise his own government on international problems. Lastly, world order is such that in municipal courts litigation is bound to arise which has a foreign aspect.

## 10.2. DEFINITION OF COMPARATIVE LAW:

Comparative law is only a method, it is difficult to define it. It has to be defined from the standpoint of the function it has to fulfill. So it is defined as a branch of legal science whose object it is to bring about systematically the establishment of closer relations between the legal institution of the different countries. This definition emphasize its purpose that of promoting the unification of laws. Salmond defines comparative law as the study of the resemblances and differences between legal system, in order to better understand the course of each system.

## 10.3. THE COMPARATIVE METHOD, ITS AIMS AND PURPOSES:

**Check Your Progress**

1. Define comparative law?

The comparative method can be applied to any form of research provided the topic or topics under study are comparable, their social legal background

(Space for Hints) studied and the subject matter of study to be analyzed for the method of comparison.

This method is helpful in that – 1) it helps the layer to critically study the laws of his own country with the aim of improving them; 2) the teaching of law can be improved; and 3) helps the migration and reception of law into one's own system. Much of Roman law and the French Civil Code have been absorbed by the legal systems of the rest of the world. The German civil code has been in many of its aspects copied in China and Japan and the Swish Civil Code in Turkey.

The purpose of comparative law is to create an international common law. It is also useful to study comparative legal history viz, the causes that led to the origin, development and extinction of legal institutions.

## 10.4. CLASSIFICATION OF COMPARATIVE LAW:

It may be classified into Descriptive comparative law and Applied comparative law or comparative legislation.

**Descriptive comparative law:** This is very simple as by comparison obtains information as to foreign law. It is nothing but a fact finding process.

**Applied Comparative law:** This kind of applied comparative law has definite aim. It is an instrument of law reform. The Romans deliberately copied Greek law in turn Roman law is copied by other countries. It also aims at unification of law.

It helps the judge also. When there is no rule of municipal law by means of which he can decide a case; he can look for guidance to the legislation of other countries. The again, to decide a dispute of an international character, he has to look to foreign law.

**Check Your Progress**

2. What are the classification comparative law?

Of greatest importance, is the fact that today lawyers handling commercial matters are ready and willing to accept and adopt voluntarily norms established by international bodies.

Another important use of applied comparative law is that the comparative jurist is able to propound abstract theories which have characteristics of

university and generality, and the historical jurist is able to trace the evolution and development of the same kind of rule or institution in several systems:

**2. Abstract or speculative comparative law:** Its only purpose is to increase our knowledge of the law.

The comparative process helps not only the judge, the lawyer and law teacher, but its resources are available to the economist, the sociologist, the statesman, the administrator or and the man of business.

**Origin and Development of Comparative Law:** Though the comparative method is an old method of studying law, it is only recently recognized as a discipline or a scientific method of legal research. Roman law can be truly said to be the only system of law which is largely indigenous.

In the Middle Ages, the rest of Europe freely copied Roman Law and the influence of Roman law was so profound that it became an obstacle to the study of other system of law even in the post Renaissance period, when there was a desire to enquire into the laws of other systems. In England such sanctity was attached to common law, that English lawyers were against encroachment upon it. Even today the position has not altered much. So there is very little comparative research in England.

In the eighteenth century Vico and Montesquieu were responsible for the idea that comparative legal research plays so important a role in enriching one's own legal system. At the end of the eighteenth and the beginning of the nineteenth centuries the greatest obstacle to the study of foreign law was the historical movement; according to which law is a spontaneous growth out of the life and spirit of the people and legislation and codification are unnecessary.

In 1829 Milter Maier, Feurbok, Gans in Germany founded the first legal review devoted to the encouragement of the study of foreign law. In England Mansfield, a comparative lawyer laid down the formation of English commercial law by his studies in the laws of other countries.

Several works such as, New products of Roman civil law by John Aylife: Burage's commentaries on colonial and foreign law; Leane Levi's The Mercantile Law of Great Britain as compared with Roman Law and the Codes

(Space for Hints)

and Laws of 59 other countries were some of the works dealing with foreign law that were published in the early half of the nineteenth century. In the second half; societies were founded every where on the study of foreign law. Different branches of legal research were under taken some to trace the evolution and growth of laws, of different systems, some to discover the common principle in them, so that unifications of law could be undertaken.

That a policy of legal isolationism, separating lawyers of different countries, producing complacent minds and stagnation of thought was dangerous was realized at the beginning of the twentieth century. America has taken up the comparative law with great enthusiasm. The Bureau of Comparative Law, was set by the Americans in 1900 which is publishing an annual journal and translating foreign codes. The U.S. Department of Commerce publishes. The Comparative Law Series which deal with commerce not only of America but of the world at large. Association of the American Law Schools publishes Modern Criminal Science Series, the continental legal History series and the history of continental civil procedure.

The two World Wars made every nation realize that there must be greater collaboration in the international sphere for the benefit mankind. A pooling of resources not only material resources, but also in the sphere of learning and science. So we find that in every country there is considerable research and a sharing of experience.

## 10.5. THE VALUE OF COMPARATIVE LAW:

Comparative law is so flexible an instrument of research, that it can be applied to every department of law. Comparative juris prudence. As already pointed out earlier any scientific juridical theory that is propounded must have the characteristics of generality and universality. So the analytical method will not alone do; as to deduce an abstract principle from a single system will be hazardous in the extreme. It is only with the help of the comparative method an analytical jurist will be able to deduce the universality of the rule of law.

> **Check Your Progress**
> 3. What are the benefits of studying of comparative law?

**Comparative legal History:** In order to better understand the principles and doctrines in various branches of law, such as law of obligations, commercial

law, Doctrine of unjustifiable enrichment, the comparative lawyer has to necessarily study them on historical lines. Sir Henry Maine's classic, Ancient Law is the result of comparative legal history.

**Constitutional and Administrative law:** Comparative law plays one of its most important roles in these two very important branches of the law. Relations between the central and local authorities, control of public utilities and public services and subjects for comparative research. As a matter of fact the drawing up of constitutions of newly created republics and democratic states is largely by the comparative method of research.

**Comparative commercial law:** As trade and commerce are of ambulatory character unification of commercial law becomes necessary. Such unification is possible only through the comparative method.

**Industrial and Labour Law:** The Law of master and servant are laws to improve the conditions of labour. Today much more than before research is undertaken in this field and every country is benefited from the experience of the other countries in dealing with labour problems. At the same time the comparative method helps every country to achieve the same standards by legislation, otherwise the advanced countries may have to face severe competition for international trade from the poorer countries. The international association of labour legislation and the international labour organization have done yeoman service in this field.

**Criminal law:** The criminal law of a country by and large depends on the social, religious, political and economic conditions prevailing in that country. So comparison does not yield worthwhile result and it is not desirable to have unification of laws in this field. It is only in the field of international crimes which are increasing today that international collaboration and understanding in how to deal with them is necessary.

**Law of Property:** The concept of property depends upon a number of factors. It is also based on political ideologies, and economic police of the government of the respective states, as such comparison is not possible. There is greater possibility of comparison where movables are concerned especially in connection with sale and hypothecation of goods.

(Space for Hints)

**Family law and succession:** These again are shaped by recial religious and political consideration. If at all comparative research is of any value in these fields it is to state the standard which should be fixed for the status of individuals.

**The law of obligations:** In this realms, that of tort and contract comparative law can and does play a very important part, as breach of contract and tortuous acts give rise to similar problems to all civilized communities and therefore, the scope of unification of law in these departments of law is greater.

## 10.6. COMPARATIVE PROCEDURE:

Comparative research can be made to play its greatest and most worthwhile role. Even when substantive rules are the same in many countries, especially in the field or commercial law, yet the procedure is so various and sometimes so cumbersome, that it nullifies the effects of the rules of law and parties go in for arbitration. So it is very necessary that procedure is simplifies and the same remedies are available in all the systems.

**Legislation and law reform:** Comparative law is an instrument of legislation and law reform. New law to meet new situation has to be created, and the legislature looks for guidance to a foreign law, both of the civil law countries and the common law countries. Much of our industrial law has been created thus. It helps also in improving our existing laws; because a study of foreign laws helps us to weigh the strength and weakness of one's own legal system.

**Comparison as a source of law:** The laws of every country practically have very little indigenous material in them. They are largely borrowed from other system and modified to suit their conditions. Indian law is largely English law modified to suit Indian conditions. English commercial law has had its source in foreign law. There is no country which has not borrowed some principles of Roman law.

**Conflict of Laws:** This is called private International Law (Refer to earlier lesson special laws). There are several points of similarities and dissimilarities between comparative law and conflict of laws; 1) Both require international collaboration in the field of private justice; 2) Both are the result of different systems of law and concerned with foreign law; 3) their concern is

with the differences that exist in the different systems in the world; but 4) they try to achieve different purposes; for comparative law is a method of study and research: whereas conflict of laws or private international law is law proper. It is used to decide disputes like any other rule of law. After having determined that the court has jurisdiction to try the case, the court determines the system of law by which the dispute has to be decided.

In **Chaplin V Boys** (1969, All E.R. 1085 H.L.) where two servicemen temporarily stationed at Malta were involved in an accident due to the negligence of one of them which injured the other and the suit for damages for injury was field in England, the court was called upon firstly, to decide the question of jurisdiction. Having found out jurisdiction the court had to decide, whether it was Maltese law that had to be applied or English law. It was held that the place of tort was over shadowed by the identity and circumstances of the parties. British subjects temporarily serving in Malta, so English law, the lex fori has to be applied.

But so far as comparative law is concerned, it is not concerned with the above problem. It has nothing to do with disputes, and does not depend for its existence on disputes.

**Private International Relations:** Today the personal relations between the peoples of different countries have intensified, and lawyers are called upon to regulate these relations and the foreign interest of their clients especially in the field of contracts. The lawyer may be called upon to draw a will with foreign beneficiaries and foreign property to dispose of or settle so some dispute that had arisen between his client and a foreign party. Unless the lawyer know the law of the parties concerned and the procedure etc., he will not be in a position to render much help. It is only comparative international law that will come to his aid.

**The Law of Nations and Comparative Law:** The only use of comparative law where public international law is concerned is to ascertain how far the study of private law can be used as a tool for promoting the growth and development of the law of nations. Whenever there are gaps in international law,

(Space for Hints) they can be filled up by those rules that are general universal or common to all civilized nations.

Article 38(3) of the statute of the permanent court of international justice provided that gaps can be filled in by such principles of private law as are held common by all civilized system of laws and in applying them no violence is done to the fundamental concepts of any of those systems.

**The Comparative approach or Judicial Precedent:** The binding force of judiciary law varies from country to country. Case law is made up of reported decisions, whether of the common law countries (England, American, or India) or the civil law countries (most of Europe) but they differ in the following respects.

**1) Continental law reports are brief :** The facts are merely summarized, arguments of counsel are not reported the conclusion of the court given in a few sentences. Though there is often a dissent voice, yet it is not heard as there is anonymity of judgement, it being of the court as a whole. There is no such decision as a majority decision and dissenting one. Continental lawyers don't hunt up precedents as they are not authoritative, and if at all precedents are mentioned in the judgement, they are mentioned not as binding, but only as supporting, but are illustrating the line of reasoning adopted by the court. On the continent not much force is attributed to a single decision but a line of similar decisions may give raise to a customary rule that the courts recognize the existence of a rule governing the solution and will follow it in the future.

Where customary law is concerned, its authority differs from country to country. In France a custom may supplement but not abrogate a rule of written law. But in Germany customary law which is the result of a long line of decisions that have erroneously interpreted the written law can be created. Such customary law is contra legam. In Switzerland customer law can be created by a long line of consistent decisions. Today in common law countries judiciary law does not give rise to customs.

In the common law countries, a single decision is a source of law. In the civil law countries, the decisions of even the superior tribunals are not binding upon the inferior tribunals. But on ground of expediency and a sense of loyalty to the judicial service the inferior courts follow the decisions of the superior courts.

Case law is also contradictory in the continental systems for the doctrine of stare decisis is not recognized and there are a large number of courts of appellate jurisdiction. The supreme court of appeal have only powers of revision and not powers of rendering a final decision as the house of lords and the supreme court of India have. The framers can only quash the judgement under appeal if it is incorrect in law in which case it goes for rehearing, invariably by a court different from the one that have the judgement under appeal. If the district court still does not agree with the supreme court, it goes back for reconsideration to the plenum of the supreme court and then the decision becomes final in the sense the court to which it is remitted must accept the view of the plenum. But it has no binding force.

Continental case law is only to fill in the gaps in codified law and to work out the practical details of the codes in their interpretation. So it can be a binding force.

Continental case law is only to fill in the gaps in codified law and to work out the practical details of the codes in their interpretation. So it can be a subsidiary source of law.

In the soviet system, case cannot create law. The judge is to only interpret statute law and cannot create law. Art 112 of the Soviet constitution says, judges are subject only to the law.

**Equity:** Whenever continental judges are allowed to exercise, their discretion, then they exercise it in accordance with justice and equity. But by and large, these judges interpret the enacted law equitably to meet the changes in social conditions. So equity is helpful in that the judge can steer the law to be consistent with the moral and social interests of the community.

**Comparative interpretation of statutory provisions:** Here we are concerned with interpretation in the narrow sense to mean the determination of the meaning of the laws, i.e. the intention of the legislature. In comparative interpretation of statue law, two difficulties arise 1) because of the technical meaning of the words, which may differ from those of common parlance, and 2) the technique employed may be different in countries. These factors create differences in the law itself out of identical statutes. In England and India

(Space for Hints)

ordinarily the intention of the legislature is discovered from the words and phrases used in the statute. But in the continental systems there are a number of theories interpretation and so a variety of judicial techniques.

a) The free law school of thought of Ehrlich and Kantorowiez. This school gives the judge absolute powers of interpretation, even to ignore statute law, if he thinks that their application is going to cause justice. This theory is now abandoned for obvious reasons.

b) The social purpose of the law theory:- According to this theory the statue should be that its meaning conforms closely to this economic or social purpose, known in Germany as the week of the statute; or the French droit social. So actually what the judge does is to ascertain the intention of the legislature or the purpose for which the law was enacted. But unlike in India or in England their continental counterparts can roam for a field in ascertaining that intention of the legislature. He is allowed to do so, so that he can render a decision which he thinks conforms to the highest standard of justice.

Studying comparatively, interpretation means, the discovering of the intention of the legislature and when the language used in a statute is clear then both systems use the grammatical interpretation. But where there are logical defects, then techniques of interpretation differ.

The logical interpretation of enacted law in the common law countries need not be taken up here, as they have been discussed in earlier lessons.

**In The Continental System**

Enacted law may be defective in several ways :- a) Supposing there are alternative cases, and only one is provided for, in such cases if the judge is of the opinion that the omission is deliberate, then he disregards the statue and seeks for the rule to decide the dispute elsewhere, if the judge feels that the omission was inadvertent then the duty of the judge is to supply the omission, he is helped by reasoning by and large to other rules contained in the same code or statute b) If there are two conflicting statutory rules the **lex generalist** (general law) must give way to the **lex specialis,** (special law) c) when there is conflict, then it must be taken that they cancel one another. An absolute rule need not be

(Space for Hints)

considered d) where the language is defective and its meaning is defective the judge can resort to the historical interpretation. He can take into consideration all the circumstances. You will remember that an English judge has to confine himself only to the rule in Heydon's case.

**Interpretation of the word – 'Intention'**

In statute law the essence of the law, lies in the intention of the legislature which is nothing more nor nothing less than the purpose for which the statute was enacted.

The word intention is capable of two meanings 1) that the legislature has in view only the circumstances as they exist when the statute is put into force, and 2) the legislature intended to lay down a law for the future, i.e., the word intention to be interpreted according to the circumstances as they exist at the time the statue is interpreted and applied i.e. to suit changing circumstances.

In Marquis of Linlithgow V. North British Railway (1912) S.C. 1327 where oil shale was discovered long after the passing of an Act of Parliament of 1817 dealing with Minerals, where in oil shale was not mentioned as extracting oil from shale was unknown. The question arose whether shale could be a mineral within the meaning of the Act of 1817. For the Marquis the lessor of the land to the railway co, it was contended that the term Mineral, must not be regarded as having a meaning fixed once for all in 1817, but as including as mineral substance. But the House of lords rejected this argument and held that the legislature has in view at the time of a particular enactment only the circumstances as they exist when the statute is put into force. This is a literal interpretation of statute law.

But in recent years, as between a literal interpretation and a reasonable interpretation, the courts are inclined to choose the latter. In Reynold v. John (1956) IQB 65 it was held the term loudspeaker would include amplified chime of bells whether or not it was electrically operated or not. Scientific inventions have placed in the markets new kinds of machinery and so legislation anterior to these inventions and discoveries has to take into account of their ex post facto existence and development. In re Aeronautics of Canada (1932) A.C 54 the Privy council has held that broadcasting falls within the description of telegraphs.

**Check Your Progress**

4. Write a note in materials of comparison?

(Space for Hints)

These two kinds of interpretation, the literal and the reasonable are known as the subjective and objective theories of interpretation respectively. The objective theory of interpretation is also the, progressive or teleological system of interpretation the letter of the law remaining the same, in substance and spirit changing to suit the changed circumstances.

## 10.7. THE PROCESS OF COMPARISON

**The subject matter of comparison:** There is nothing under the sun that cannot be the subject matter of comparison; doctrines, customs, practices, rules, etc. But for the purpose of comparative legal research certain factors are to be taken into consideration 1) one's conception of comparative law, 2) The aim to be achieved 3) that certain topics are not quite suitable for comparison, because of peculiarities in the social, economic or political conditions of the countries concerned, 4) to achieve the best results, like must be compared with like 5) the concepts, rules of comparison must relate to the same stage of legal, political or economic development.

The aim to be achieved will depend upon the material and expertise available to the researchers. The investigator should not pursue his research into laws written in a language with which he is unfamiliar, as this is hazardous; and he should also be careful not to study entire systems, because in every system there are cross division such as are found, for instance in the law of India where the law of obligations, property and evidence are based on the English model, which family law and succession are based on indigenous law founded on religion and tradition and differing from one religious group to another.

**The source of foreign law:** So far as continental systems are concerned, the codes are not the sole source of law. Though chief source of law, the codes are supplemented by statute law, case law, custom, opinion of commentators and text book writers, modernized Roman law and is used to remedy the defects and omissions. There is a great deal of difference the continental codes and Anglo-Indian codified statutes.

| | Continental Codes | Anglo-Indian Codified Statutes |
|---|---|---|
| 1 | New rules not based on preexisting law, are laid down | Customs and precedents give more authoritative form. |
| 2 | Prefaced by a general section dealing with the general principles | Divided into two sections, one dealing with general principles of law, and the other with the particular acts. |
| 3 | No distinction between real and personal property or between contract and tort. | Clear cut distinction. |
| 4 | Procedural rules are found in dealing with substantive law and vise versa. | Ordinarily the two are codes kept separate. |
| 5 | Divided into articles and paragraphs | Divided into sections and sub sections and clauses. |
| 6 | No elaborate definition or interpretative section. So wider powers of interpretation | Elaborate definitions and interpretative sections. The court cannot go out side them. |

Another danger which the comparative lawyer, will have to take note of is that identical phraseology in the code, will have dissimilar effect and operation. The word 'eventually' in the foreign codes is not eventually in other codes. The French 'transaction' means 'compromise' which French compromise is arbitration clause. Divortium in Roman Law is divorce in Anglo-American countries, but divorcio is separation in Spain and Latin American countries. In Cuba it is both divorce and separation. Trennung is separation and scheidung is divorce in Germany but in Austria, they mean just the opposite.

Custom is a legal source of law in Anglo Indian jurisprudence but it is only a subsidiary source of law to the continental lawyer. Professional opinion and opinion of jurists carry weight with a continental judge.

(Space for Hints)

**Materials for comparison:** a) Bibliographies; b) works of one cyclopedic type; c) Codes; d) law reports; e) text books; f) commentaries and g) legal periodicals.

**The special problems of comparative law:** Difficulties due to difference in language. Language is one of the greatest obstacles in comparative law, and which separate the various legal systems of the world. Although today many countries have undertaken the task of translating foreign law, yet one cannot be too careful, for a wrong translation may alter or entirely destroy the significance of sentence.

Legal terminology varies from country to country, unlike the other disciplines like medicine, theology, mathematics, the natural and physical science, etc which possess a common vocabulary. Even the countries which frame laws in the same language, identical phrases do not convey the same judicial meaning. So the legal and the commercial words should get together and forget a common vocabulary to facilitate not only intercourse between the nations, but also for the purpose of unification of laws.

**The international importance of legal terminology:** Treaties are usually framed in the first instance in one or two language and then translated, which past experience has shown invariably brought about misunderstanding which result in contradictions and obscurities because the tradesman and the translator each if influenced by the concepts of his own national laws. A classical example of this is, there was a great deal of difficulty in the treaty of Versailles about the word debt in the English version and dettes in the French text. The French dettes means any kind of obligation, liquidated or not whereas the English debt is an obligation to pay a certain sum of money. The term equity is another of its different meaning.

The problems of Multi Lingual Laws. In a country like India with several official languages, if laws are promulgated in all of them, difficulties are bound to arise. To avoid these difficulties joint consultations with all the draftsmen are necessary. An international juridical (Legal terms) dictionary will go a long way to solve some of the problems of comparative law.

## 10.8. COMPARATIVE LAW AND LEGAL EDUCATION:

In England not very much has been done in this field since a chair of historical and comparative jurisprudence was instituted in 1869 at Oxford and Sir Henry Maine was its first holder. But America has given a boost to the study of comparative law in various fields.

The greatest difficulty of introducing comparative law in law school, is the language problem. Unless a student knows at least some of the foreign language comparative research cannot be pursued with profit. The only way out will be to confine the comparison to two systems of law as in the case of English law and Indian law, or Indian law and Roman law. Legal education in India has some comparative law for instance: law relating to property, contracts, torts, crimes; evidence among others, are all taught comparatively comparing them with English laws; or American laws, Hindu law is taught comparatively with Muslim law. Dearth of books is another draw back.

So it is suggested that the comparative law studies and research are much more suitable to the postgraduate level of legal education than the undergraduate level. The students are mature and are profitable to themselves and to the general welfare of the community to pursue comparative law studies and research.

## 10.9. SUMMARY

To promote unification of law Comparative law is introduced. it is only a comparative method of studying law and it is used to harmonize the different systems of law and. Comparative law is a method of enriching one's own legal system and understanding it better. Comparative law is so flexible an instrument of research, that it can be applied to every department of law. Comparative jurisprudence is propounded must have the characteristics of generality and universality. So the analytical method will not alone do; as to deduce an abstract principle from a single system will be hazardous in the extreme. It is only with the help of the comparative method an analytical jurist will be able to deduce the universality of the rule of law. Comparative Law is an instrument of legislation and law reform. It helps also in improving our existing laws; because a study of foreign laws helps us to weigh the strength and weakness of one's own legal

(Space for Hints)

system. Today the personal relations between the people of different countries have intensified, and lawyers are called upon to regulate these relations and the foreign interest of their clients especially in the field of contracts. Unless the lawyer know the law of the parties concerned and the procedure etc., he will not be in a position to render much help. It is only comparative international law that will come to his aid. The importance of comparative law leads as study in depth. Further the procedure for comparison is also discussed in this lesson in detail.

## 10.10. KEY WORDS

| | | |
|---|---|---|
| Multi lingual | – | various language |
| Bibliographies | – | Description of referred book |
| Continental | – | Division of Land |

## 10.11. ANSWER TO CYP QUESTIONS

| | | |
|---|---|---|
| For Question No. 1 | – | Refer section 10.2 |
| For Question No. 2 | – | Refer section 10.4 |
| For Question No. 3 | – | Refer section 10.5 |
| For Question No. 4 | – | Refer section 10.7 |

## 10.12. MODEL QUESTIONS

**(A) Long Answer Questions**

1. Discuss how comparative Law study contributes to the unification of Law.
2. "Comparative Law study contributes richly to comparative interpretations and evaluation of Law" Comment.
3. Comparative Law is only a method and not a distinct branch of Study Elucidate.

**(B) Short Answer Questions**

1. Trace the origin and development of comparative Law
2. What are the aims and purposes of Comparative Law
3. Write a note on concept of comparative Law and Explain types of comparison.

(Space for Hints)

# MODEL QUESTION PAPER

# LEGAL THEORY (JURISPRUDENCE)

## PART A – (5 x 15 = 75 marks)

**Answer any FIVE questions**

**Each questions carries 15 marks each**

1. Define Law and make out Salmond's classification of Law.
2. Analyse the tenets of Analytical School of Jurisprudence.
3. What is Sovereignty? Explain its characteristics.
4. "Rights in the wider sense means four things" – Discuss.
5. Forward your arguments in support of abolition of Death Sentence.
6. Explain the different kinds of liability as imposed under Law.
7. Who is a legal person? What are the kinds of Legal Persons?

## PART B – (5 x 5 = 25 marks)

**Answer and ~~FIVE~~ questions**

**Each question carries 5 marks**

8. Write short notes on :

   (a) Legal Theory and Jurisprudence

   (b) Custom and usage

   (c) Retributive Theory of Punishment

   (d) Adverse Possession

   (e) Absolute and Relative Duty

   (f) Trust

   (g) Law of nature

   (h) Unification of Law.